COPYRIGHT INFRINGEMENTS
(Audio and Video Recorders)

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 1758

A BILL TO AMEND TITLE 17 OF THE UNITED STATES CODE TO EXEMPT THE PRIVATE NONCOMMERCIAL RECORDING OF COPYRIGHTED WORKS ON VIDEO RECORDERS FROM COPYRIGHT INFRINGEMENT

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COPYRIGHT INFRINGEMENTS

(Audio and Video Recorders)

MONDAY, NOVEMBER 30, 1981

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2:15 p.m., in room 6226, Dirksen Senate Office Building, Hon. Dennis DeConcini (acting chairman of the committee) presiding.

Present: Senators DeConcini and Denton.

Also present: Senator D'Amato and Congressman Parris.

Staff present: Eric Hultman, general counsel; Tim McPike, counsel; and David Van Engelhoven, assistant to minority counsel, Subcommittee on the Constitution.

Senator DeConcini. The full Judiciary Committee will come to order.

I welcome the distinguished group of witnesses here, Senator D'Amato and Congressman Parris, who will have statements in just a moment.

This is a hearing of the full Judiciary Committee on S. 1758. Senator Strom Thurmond, the chairman of the committee, could not be here right at this time. He is tied up with administration officials and asked that I introduce in the record his statement of introduction in commencing these hearings.

[Material follows:]

Prepared Statement of Chairman Strom Thurmond

Today, the Judiciary Committee will hear from a wide variety of witnesses on S. 1758, a bill introduced by Senators DeConcini and D'Amato to reverse the decision of the Ninth Circuit Court of Appeals finding off-the-air recording an infringement of the copyright law. I am a cosponsor of S. 1758 and believe that it is sound legislation.

As my colleagues are also aware, in 1976 when the Copyright Act was last revised, a number of difficult issues involving copyright protection were raised. In response, the Congress passed a law that contained several provisions to protect copyright owners such as the mechanical royalty for records and a compulsory license for secondary transmission by cable. Some witnesses will advocate the consideration of similar protections for copyright owners where both video and audio recorders are involved. There will probably be suggestions that a royalty fee on blank tape be given consideration by the Committee.

Understandably, these are important issues, but I hope they would not impede the ultimate passage of legislation to correct the decision of the Ninth Circuit Court of Appeals. In the meantime, I know the Committee will listen to all sides in this debate and keep an open mind on these important questions.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Before turning to the matter at hand and our group of witnesses here, I would like to publicly express my deep appreciation to the distinguished chairman, Strom Thurmond, for holding these hearings today.

Jurisdiction over copyright matters lies with the full committee, and the chairman has gone well beyond the demands of conventional courtesy in assuring speedy action on this pressing issue. I should also like to commend his able staff, particularly Eric Hultman, for devoting the time and effort necessary to set up these hearings on such short notice.

In 1976, Universal Studios and Walt Disney Productions sued the Sony Corp. of America in Federal district court claiming that video cassette recorders produced by Sony and others infringed upon their copyrighted material.

The district court found for the defendants, but the matter was appealed to the Ninth Circuit Court of Appeals by Universal and Walt Disney Studios. At the end of last month the circuit court reversed the district court, remanding the case for the purpose of assessing damages.

Without going into all aspects of this complicated case, including the current appeal to the Supreme Court, I would simply like to state that I am convinced that this is clearly an issue for Congress to decide, not the courts. The courts are at a disadvantage. They cannot, or at least should not, make the law. Their function is to interpret what Congress meant to cover and what Congress meant to exempt in the Copyright Act.

In point of fact, Congress never did consider specifically the issue of video cassette recorders and, in that context, what the full reach of the Copyright Act should be. This is a field of burgeoning technology which is constantly outdistancing static legal concepts.

In agreeing that artistic productions should be protected by copyrights to insure not only the reasonable property rights of the producers, but to stimulate the creative process, Congress did not assess whether such copyright protection should reach into the living rooms of private American citizens.

Today, because of the invention and marketing of video cassette recorders, about 3 million American homes have the capability to record television signals on tape for replay at a time of the individual's choosing.

The issue which I believe the Congress must now address is whether: (a) the consumer who tapes a television broadcast for replay at a time or times convenient to him or her is violating the Copyright Act, and (b) whether the intent of the act should be extended to reach into individuals' homes by either banning the sale of video cassette recorders or creating a special tax on recorders and blank tapes that would be distributed to copyright holders.

In drafting S. 1758, Senator Thurmond, Senator D'Amato, and I have clearly stated our view on the matter. S. 1758 amends the Copyright Act by creating an exemption to the act for individuals taping broadcasts for their personal, noncommercial use.

It is our strong belief that Congress never intended to deprive the individual of his or her rights to tape signals legally entering their living room for replay at a more convenient time or times. Indeed, it is this Senator's view that once a signal crosses the threshold of the individual's home, all copyright obligations cease unless the signal is captured for commercial purposes.

Representatives of some copyright holders' groups have suggested that our legislation be modified to clarify that the individual using a video cassette recorder is not violating the law but that we simultaneously impose upon the consumer yet another tax or fee, this one redounding to the benefit of copyright holders. I expect that one or more of our witnesses today will be arguing for such a proposal, and I am interested to listen to those proposals, but I have some skepticism if indeed they are what I have made reference to.

It is not generally my inclination to reject ideas in advance of their formal presentation. But although I am firmly committed to working with the entertainment industry to insure that the wording of our legislation does not go beyond our intent, I am equally opposed to the imposition of a copyright tax on the American consumer. To create such a tax, or whatever euphemism may be used for the tax, concedes that the individual does not have a right to the television signal which legally enters his home.

Home video recording does not deprive the entertainment industry of copyright proceeds to which they would be entitled in its absence. But a new copyright tax would add to the coffers of copyright holders hundreds of millions of dollars from individuals sitting in their own living rooms who wish merely to time shift existing programming.

It is my view that the individual consumer has already paid for copyrighted material that enters the home, albeit indirectly, but sometimes even directly. Movies and other entertainment features broadcast on free television are paid for, usually quite handsomely, by the networks on the basis of whatever the market will bear.

The networks charge advertisers for the privilege of giving their products exposure concurrent with the airing of the entertainment item, and the circle closes when the American consumer purchases merchandise to which has already been added the cost of advertising. Thus, in a roundabout way the American consumer has already paid the copyright fee to the copyright holder.

In the case of pay television, the connection is direct. An individual pays a monthly fee for certain events like movies, the proceeds of which are used by the supplying company to pay copyright holders and other costs and, of course, the profit.

I would like to make it equally clear, however, that our legislation exempts only individuals who tape programs strictly for their personal, noncommercial use. S. 1758 only addresses one very specific problem area which demands immediate resolution. It does not address the myriad other problems which have been and are being created by the tremendous advances in communications technology. Congress must begin the process of integrating current technology with existing legal concepts such as the copyright laws.

The basic issue here today is the right of the consumer versus the right of the copyright holder, although I should note that not all copyright holders have viewed home taping as an infringement.

The question is: Should the Copyright Act extend into the homes of American citizens who desire to tape programs for reviewing at another time? Or should the American consumer be exempt from this extension of the Copyright Act into the home?

I believe that S. 1758 captures not only the original intent of Congress but certainly reflects its current feeling. I will do everything I possibly can to insure that the full Senate has this issue brought before it in a most timely fashion.

Before closing my statement and welcoming our distinguished witnesses, I would again reiterate my thanks to the chairman of this committee, Senator Thurmond, for his efforts in support of this legislation and the hearings today. Also, Senator D'Amato will speak for himself, but I would simply like to thank him and his staff, with whom we have worked and cooperated from the outset in what I believe is a wholly cooperative, bipartisan effort to resolve a delicate and difficult issue.

Senator Denton.

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Thank you, Mr. Chairman.

Allow me first to congratulate both you and the coauthor of the bill. I applaud the quick response to this knotty problem and your equally prompt scheduling of hearings on this important copyright issue. I believe that this committee hearing should be welcomed by the electronics and entertainment industries as well as by the American consumer.

For all its gravity, the so-called Betamax case does have a lighter side. In the last several weeks I have been treated to a number of cartoons dealing with this question, including one of a bewildered family being bundled into a paddy wagon as one bath-robed elderly lady, a neighbor, whispers to another, "I understand they were watching a home-recorded videotape." I have had a few cartoons made of bills that I have introduced, so there is nothing novel there.

The court's ruling in the *Universal* v. *Sony* case was unprecedented, and many believe that it represents one more instance in which technology has outpaced our laws. The 1976 revision of the Copyright Act was an attempt to update that body of law in every imaginable way.

This hearing is perhaps attributed to the ingeniousness of man, in that we are faced once again with a controversy over the impact of a sophisticated and readily available technology on newly codified copyright laws.

I believe the Congress of the United States is an appropriate forum in which to resolve the differences between the competing interests represented in the *Sony* case. As we proceed, I know that this committee will seek to protect the rights of both the producers and consumers of entertainment and video equipment.

I shall follow with interest the testimony of all those invited today and wish once again to acknowledge your leadership, Mr. Chairman.

I have noted the presence of an outstanding Alabamian on the list of those about to testify and like our distinguished colleague, Senator D'Amato, would ask the chairman that I be afforded the pleasure of introducing Mr. Julius Kretzer at the appropriate point in today's proceedings.

Senator DeConcini. Thank you, Senator Denton.

At this time we will hear from Senator D'Amato of New York. Senator D'Amato, we welcome you and thank you for your cooperation and assistance in this matter. Please proceed.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'Amato. Thank you very much, Mr. Chairman and Senator Denton.

I am especially pleased to have this opportunity to address the hearing today on S. 1758, a bill which would exempt the private, noncommercial recording of copyrighted works on video recorders from copyright infringement. I think that is important. We are talking about a bill that exempts the private, noncommercial recording of copyrighted works on video recorders from copyright infringement.

My interest in this matter arose when I read of the opinion handed down by the U.S. Court of Appeals for the Ninth Circuit. Under the ninth circuit's opinion, over 3 million owners of video recorders would be liable for damages if they used their equipment to record from their televisions.

To me it seems most unjust that people in the privacy of their own homes should be unable to use their equipment in a private, noncommercial manner. So, I was especially delighted and pleased to be able to work with Senator DeConcini and his staff. I want to pay public tribute to the chairman and his staff for coming up with a proposal that I think treats this matter fairly, deliberately, and, yes, expeditiously, because time is of the essence. Owners and users of videotape recorders should be afforded certainly the same rights enjoyed by audio enthusiasts.

Since the inception of audio technology people have been recording from the radio without penalty, and the consumer and the industry have jointly benefited from the ability to record from commercial programing for private home listening. This same relationship, until recently, has existed between the consumer and the video recording industry.

Furthermore, the benefits of home video recording extend to numerous industries involved. The television industry significantly benefits from the wider viewing audience generated by delayed viewing, which in turn greatly increases the impact of television advertising.

The Ninth U.S. Court of Appeals said in its opinion that it is the prerogative of Congress to provide exemptions in the area of copyright law, and it is clear that the technological advances in the videotape recording field have created an inequitable situation under current copyright law, especially as that was interpreted by the recent decision.

Congress has not examined this area of law since 1976. S. 1758, which Senator DeConcini and I have introduced, would address this situation. Our bill would update the copyright law to reflect recent technological advances. It is in no way infringement upon the powers of the judiciary.

I would hope, Mr. Chairman, that as a result of this committee hearing and the testimony that will be presented to the committee, we would be able to go forth with a bill that could be acted upon expeditiously in the Senate.

Senator DeConcini. Thank you, Senator D'Amato. We welcome you in this committee to join us up here to listen to the testimony and participate.

We are very pleased to have Representative Stan Parris, who has introduced similar legislation in the House of Representatives.

Representative Parris, please proceed.

STATEMENT OF HON. STAN PARRIS, A U.S. REPRESENTATIVE FROM THE STATE OF VIRGINIA

Mr. Parris. Thank you, Mr. Chairman and Senator Denton. I appreciate the opportunity to testify today, and I would submit my complete statement for the record, with your permission.

Senator DeConcini. Without objection, it will be included in the record.

Mr. Parris. I will simply summarize briefly the points that we try to make in that statement.

The Ninth Circuit Court of Appeals decision that we address today, in my opinion, was just the latest example of idiocy by the Federal judiciary and is a decision that is another unwarranted intrusion by the Federal courts into the privacy of American homes and is an extension of the intent of Congress that was never intended. It means that 9 to 12 million Americans who view their 3 million video recorders are violating the law if they record television programs without first obtaining the permission of the programs' producers, which is clearly impossible.

Therefore, on October 21, I introduced legislation in the House of Representatives, H.R. 4808, which is identical to the bill that you address today, S. 1758, to correct the inequity by allowing the continued sale and use of videotape recorders for noncommercial purposes.

As of this morning in the House of Representatives, my legislation has attracted 25 cosponsors, and I am sure that there will be considerably more support as the public and the Members of Congress return from the Thanksgiving break and become aware of the dilemma caused by this decision. This is an issue, as I see it, which is totally nonpartisan and has captured the interest of Members of the Congress from all regions of the country.

If the ninth circuit's decision is allowed to prevail, we will be jeopardizing a prosperous and growing industry with a very bright future. By the end of this year, I am told that there will be over 3 million video recorders in American homes with an additional sale of 2 million estimated for 1982. There are 35,000 education and entertainment oriented prerecorded cassettes to choose from today on the market, including 4,000 movies, all of which have copyright royalties paid on them already. The total blank and prerecorded tape sales this year will exceed 25 million and for next year, 1982, it is estimated to be 35 million units.

When Congress last amended the Copyright Act in 1976, as Senator D'Amato referred to in a comprehensive way, video recorders were still in their infancy. The technology has been developed, and they have increased obviously in popularity, but the Congress has simply failed to keep up with those changes.

If we do not amend the Copyright Act now, the makers, the distributors, and the sellers of VCR's would be liable for damages, and VCR owners who tape programs in their homes would be guilty of copyright infringement. By enacting this legislation, Congress would be protecting the VCR owners from any infringement of the Copyright Act if they do not use their recorders for noncommercial purposes. I think that is the key to this legislation.

This legislation is very simple. There is nothing complex about it. It is consumer legislation. If we do not act, this controversy may be in fact tied up in the courts for years, and I submit respectfully to the committee that to combine the issues of royalties and entertainment talent rights with the issue of utilizing individually preowned, prepurchased equipment just unnecessarily confuses the entire matter. The questions are totally separable, and I think it would simply be inappropriate to combine and thereby confuse the entire problem.

The principal use of this equipment by everyday Americans is in so-called time shifting, and although some of us would like to have the ability to do so occasionally, there is no technology of which I am aware that will exercise the commercials from the beginning to the end of what you tape. So you get it just like it comes to you in the first instance. The only difference is that you get it when you are able to watch it. It does not seem to me that that is a very complicated problem.

A matter of convenience for individual Americans who have made a significant investment for their own enjoyment is what we are addressing today, and I think very frankly, as I have indicated before, that we are jeopardizing a prosperous industry, and I certainly hope that it will be the pleasure of the committee and the full Senate to report the bill and send it to the House at an early date.

I thank you very much for the opportunity to be with you.

Senator DECONCINI. Thank you, Congressman. We are very pleased to have you. If you care to join us here before you return to the House, please feel free to make yourself at home. We are glad to have you here.

Mr. PARRIS. Thank you very much.

Senator DECONCINI. Before we begin with the first witness I wish to place the text of S. 1758 in the record.

[Prepared statement and S. 1758 follow:]

STATEMENT OF STAN PARRIS
ON VIDEO RECORDER LEGISLATION

MR. CHAIRMAN, I APPRECIATE HAVING THE OPPORTUNITY TO TESTIFY THIS AFTERNOON, AND I COMMEND THE CHAIRMAN FOR HIS PROVIDING CONGRESS WITH THIS FORUM TO DISCUSS A VERY SERIOUS PROBLEM.

I WAS EXTREMELY DISTURBED WHEN I LEARNED THAT THE NINTH U.S. CIRCUIT COURT OF APPEALS RULED THAT THE USE OF HOME VIDEO RECORDERS WAS IN VIOLATION OF FEDERAL COPYRIGHT LAWS. FRANKLY, I FEEL THAT THIS WAS JUST THE LATEST EXAMPLE OF IDIOCY IN THE FEDERAL JUDICIARY. THIS UNREASONABLE DECISION MEANS THAT NINE TO TWELVE MILLION AMERICANS WHO VIEW THE THREE MILLION VIDEO RECORDERS ARE VIOLATING THE LAW IF THEY RECORD TELEVISION PROGRAMS WITHOUT FIRST HAVING THE PERMISSION OF THE PROGRAM'S PRODUCERS.

BY THE END OF THIS YEAR, THERE WILL BE OVER THREE MILLION VIDEO RECORDERS IN AMERICAN HOMES, WITH AN ADDITIONAL SALE OF TWO MILLION ESTIMATED FOR 1982. SINCE THEIR INTRODUCTION IN THE EARLY 1970'S, VCRS HAVE COME DOWN IN PRICE AND HAVE INCREASED IN POPULARITY. THEIR POPULARITY SEEMS TO STEM FROM THE FACT THAT VIDEO RECORDERS HAVE MANY USES. THEY CAN PLAY PRERECORDED VIDEO CASSETTES, THEY CAN BE USED WITH A VIDEO CAMERA TO MAKE HOME MOVIES, AND THEY CAN BE USED TO RECORD A TELEVISION PROGRAM AND PLAY IT BACK AT A LATER TIME. SURVEYS HAVE SHOWN THAT VCRS ARE USED MAINLY FOR RECORDING A PROGRAM AND PLAYING IT BACK WHEN IT IS MORE CONVENIENT. THIS CONCEPT IS REFERRED TO AS "TIME-SHIFTING."

TO CORRECT WHAT I PERCEIVE TO BE AN UNWARRANTED INTRUSION BY THE FEDERAL COURTS INTO THE PRIVACY OF AMERICAN HOMES, I INTRODUCED LEGISLATION IN THE HOUSE WHICH WOULD PERMIT THE CONTINUED SALE AND USE OF VCRS FOR NON-COMMERCIAL PURPOSES. MY BILL, H.R. 4808, WAS INTRODUCED ON OCTOBER 21ST AND IS IDENTICAL TO THE LANGUAGE CONTAINED IN THE MEASURE PENDING BEFORE THIS COMMITTEE, S. 1758. AS OF THIS MORNING, WE HAD 25 CO-SPONSORS TO H.R. 4808, AND I'M SURE WE WILL BE ATTRACTING MORE SUPPORT AS THE PUBLIC AND MEMBERS OF CONGRESS BECOME AWARE OF THE DILEMMA POSED BY THE RECENT COURT DECISION. AS MY LIST OF CO-SPONSORS INDICATES, THIS IS A BI-PARTISAN ISSUE WHICH HAS THE INTEREST OF MEMBERS FROM ALL REGIONS OF THE COUNTRY.

WITH OVER THREE MILLION RECORDERS ALREADY IN AMERICAN HOMES, IT IS OBVIOUS THAT VCRS HAVE BECOME A PROSPEROUS AND GROWING INDUSTRY. DUE TO THE POPULARITY OF VCRS, THE MANUFACTURERS AND DISTRIBUTORS OF VIDEO RECORDERS AND VIDEO TAPE ARE EXPERIENCING AN ENORMOUS AMOUNT OF GROWTH AND ARE EMPLOYING GREAT NUMBERS OF AMERICANS. I AM TOLD THAT THERE ARE OVER 35,000 EDUCATION AND ENTERTAINMENT ORIENTED PRERECORDED CASSETTES TO CHOOSE FROM TODAY, INCLUDING 4,000 MOVIES, ALL OF WHICH HAVE COPYRIGHT ROYALTIES PAID ON THEM. TOTAL BLANK AND PRERECORDED TAPE SALES WILL EXCEED $25 MILLION THIS YEAR AND ARE ESTIMATED AT $35 MILLION FOR 1982.

IF THE NINTH CIRCUIT COURT OF APPEALS DECISION IS ALLOWED TO PREVAIL, WE WOULD BE JEOPARDIZING A PROSPEROUS INDUSTRY WITH A VERY BRIGHT FUTURE. ACCORDING TO THIS COURT DECISION, THE MAKERS, DISTRIBUTORS, AND SELLERS OF VCRS WOULD BE LIABLE FOR DAMAGES, AND VCR OWNERS WHO TAPE PROGRAMS IN THEIR HOMES WOULD BE GUILTY OF COPYRIGHT INFRINGEMENT. TO ADD FURTHER TO THIS DILEMMA, UNIVERSAL STUDIOS FILED A SIMILAR COPYRIGHT INFRINGEMENT SUIT ON NOVEMBER 6, 1981. THIS ACTION IS DIRECTED AT THE ENTIRE VIDEO RECORDER INDUSTRY AND SEEKS AN INJUNCTION AND DAMAGES FOR HOME TAPING AND FOR PROGRAMS CARRIED ON CABLE AND PAY T.V.

ONE FACTOR WHICH I'M SURE INFLUENCED THE COURT'S DECISION WAS THAT THE FEDERAL COPYRIGHT ACT DOES NOT CLEARLY DEFINE WHAT CONSTITUTES THE FAIR USE OF A COPYRIGHTED WORK. WHEN CONGRESS LAST AMENDED THE FEDERAL COPYRIGHT ACT IN 1976, VIDEO RECORDERS WERE STILL IN THEIR INFANCY. SINCE THAT TIME, VCRS HAVE INCREASED IN NUMBER AND POPULARITY, BUT CONGRESS HAS FAILED TO KEEP UP WITH THIS ADVANCE IN TECHNOLOGY. THE COPYRIGHT ACT SHOULD NOT BE USED TO PENALIZE CONSUMERS WHO USE VIDEO RECORDERS IN THEIR HOMES FOR NON-COMMERCIAL PURPOSES. I WOULD HOPE THAT CONGRESS WILL CORRECT THIS INEQUITABLE SITUATION BY AMENDING THE COPYRIGHT ACT AS SOON AS POSSIBLE.

If we do not take action, consumers may be denied access to television programs for fear that they might be duplicating a broadcast and be subject to some sort of penalty. If H.R. 4808 and S. 1758 are enacted, we would be protecting the VCR owners from any infringement of the Copyright Act if they do not use their recorders for commercial purposes. This legislation is that simple -- there is nothing complex or controversial about it. Since Congress has not kept up with new advances in technology, the Copyright Act will eventually have to be amended along these lines anyway. If we do not act, this matter will probably be tied up in the courts for years. I urge Members of this Committee and my colleagues in the Congress to support this legislation in an effort to quickly resolve a very serious problem.

II

97th CONGRESS
1st Session

S. 1758

To amend title 17 of the United States Code to exempt the private noncommercial recording of copyrighted works on video recorders from copyright infringement.

IN THE SENATE OF THE UNITED STATES

October 21 (legislative day, October 14), 1981

Mr. DeConcini (for himself and Mr. D'Amato) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17 of the United States Code to exempt the private noncommercial recording of copyrighted works on video recorders from copyright infringement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 1 of title 17 of the United States Code is amended by inserting at the end thereof the following new section:

"§ 119. Limitation on exclusive rights: Exemption for certain video recordings

"Notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if—

"(1) the recording is made for a private use; and

"(2) the recording is not used in a commercial nature.".

SEC. 2. The table of sections for chapter 1 of title 17 of the United States Code is amended by inserting after the item relating to section 118 the following:

"119. Limitation on exclusive rights: Exemption for certain video recordings.".

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Senator DECONCINI. Our first witness today is Prof. Leon Friedman of Hofstra University. Is Professor Friedman here?

[No response.]

Senator DECONCINI. If not, we will proceed to the next witness, Mr. Joseph Waz, the deputy director of the National Citizens Committee for Broadcasting.

Mr. Waz, would you please come forward? Would you please identify yourself and proceed to summarize your statement?

STATEMENT OF JOSEPH WAZ, DEPUTY DIRECTOR, NATIONAL CITIZENS COMMITTEE FOR BROADCASTING

Mr. WAZ. My name is Joseph Waz. I am deputy director of the National Citizens Committee for Broadcasting, which is a consumer group concerned with issues in the electronic media headquartered here in Washington.

As noted in the testimony, copies of which will be provided, we enjoy the support of some 8,000 citizens and consumers here in the United States. Our board is chaired by Ralph Nader, and former FCC Commissioner Nicholas Johnson is also on our board.

We appreciate your invitation to present our point of view on the interests of consumers before this committee as it addresses one of the many difficult issues to which recent advances in home electronics have given rise.

NCCB believes the interests of consumers are best served by a communications system which allows the greatest number of consumers to enjoy the broadest possible range of services at the lowest possible cost.

Today's video marketplace, if aided by governmental policies which protect the interests of consumers, promises to offer an age of video abundance, a genuinely diverse and democratic system of communications.

If this marketplace continues to flourish, it can expand access by artists and producers to new and appreciative audiences. It will allow the pluralism of our national culture and the many sides of our national debate to circulate more freely without the artificial bottlenecks of the present system.

Consumers want and deserve access to this video diversity that is taking place today with the advances in technology. Consumers want access to the widest available range of over-the-air television services, including new drop-in TV stations and the proposed low-power TV service. Consumers want access to the new bounty of programing delivered by other media, including cable TV, subscription TV, MDS, and in the not too distant future, direct broadcast satellites.

Consumers want access to home video tools that not only allow them to view prerecorded programing, either on tape or disc, but also allow them the option of producing their own video or the convenience of making copies of programing for their private use.

Of course these interests of consumers are best served by a vigorously competitive video marketplace, one which provides the proper incentives for the investment of energy, creativity, and capital, which in turn yield that very valuable commodity, the television program. With an estimated 3 million video cassette recorders [VCR's] in use and estimated 1.5 additional recorders expected to be in use by 1982, this represents a sizable investment by the American consumer.

VCR's are useful tools with many functions. With a hand-held camera a mother can capture her daughter's first steps on video. After a trip to the public library or the video rental store, a family can watch a recent feature film or a Bogart classic in the comfort of their living room. A laborer can set the timer on his VCR before leaving for work on second shift, return home after midnight, and watch several hours of prime-time programing in his own prime time. Consumers deserve protection in all these endeavors.

Many of the uses of VCR's raise no copyright questions whatsoever, and many uses of copyrighted materials raise no questions as to their fairness. In the long run, no good whatsoever can come from banning the VCR, as some would suggest. Indeed, the injunctions suggested as a possible remedy by the ninth circuit court would be laughably unenforceable, as many newspapers have suggested around the Nation.

For the time being, the relief offered by S. 1758 is both appropriate and realistic. The bill would remove any stigma of apparent liability from a practice which is, in and of itself, harmless to the general public and useful to individual consumers. This relief should not be delayed or denied.

However, the legislation before this committee should not be considered an ultimate solution to the many thorny copyright issues surrounding home video recording and consumer electronics in general.

There are important issues of fair compensation for producers and artists which must in time be addressed, perhaps in subsequent legislation. Moreover, the impact of unrestrained home recording from various programing sources has to be assessed as it affects the total video marketplace from which consumers may choose.

Copyright is the mechanism by which we assure a continued flow of video productions to the marketplace. While it is desirable that as many Americans as possible should benefit from the wonders of video, it is unrealistic to think that these wonders emerge from some inexhaustible source. If video artists and producers do not perceive opportunities to benefit fairly from the use and enjoyment of their products, they will be disinclined to create them.

If there is a demonstrable loss to artists and producers as a result of home video recording, and if this loss is so significant as to endanger the wealth of viewing options available to Americans, then the public interest cannot be served by permitting home recording without some suitable compensation to holders of copyrights.

There are many questions that have to be considered in this context: What is the measure of loss suffered by a copyright holder? What constitutes fair compensation for this loss? Who should bear the cost of this compensation, and in what manner should this cost be imposed?

The most frequently discussed method of compensation, as suggested earlier today, is a tariff of some sort on videotapes and/or home recording equipment. This tariff system would seem to be the most equitable and the most administratively efficient mechanism available. If the cost of compensation is spread widely among all in the video recorder user group, the cost of home video products need not be rendered prohibitive.

What are copyright holders actually losing to home taping? The available studies on the habits of VCR owners vary wildly in their conclusions. A PBS study shows that once a consumer tapes an over-the-air program and views it, he almost invariably erases the tape or tapes over the earlier program and almost never makes any commercial use of the recording. Yet a UCLA study commissioned by Paramount reportedly shows that 85 percent of those who tape do so for library purposes—that is, to keep a show for future viewing.

Clearly, any accurate determination of just how much home taping is going on and how much of this taping is not fair use for copyright purposes must await an objective and thorough survey of the user public.

There may also be some merit in the argument advanced by Senator D'Amato that no one in the TV programing chain, whether it be the program producer, the broadcaster, or commercial sponsor, loses at all when a program is taped for home use. This too has to be weighed into any determination of the loss suffered through home videotaping.

A compensation system based on equipment and tape tariffs and administered by an organization like the Federal Copyright Royalty Tribunal or the private music licensing agencies makes the most sense if indeed there is a loss to be compensated.

It would be advisable to put such a mechanism in place to deal with the predicted proliferation of home recording equipment, but there are a number of considerations in constructing such a scheme, some of which I have tried to highlight already, that may have important consequences for the consumer.

First of all, such a system of compensation should not be seen as a way to compensate for the loss of revenues from the so-called piracy of video recordings. Piracy is the unauthorized reproduction and sale of copyrighted materials. It is theft, and it warrants tough penalties.

However, the innocent consumer should not be expected to compensate for a loss for which he has no responsibility. Indeed, it is likely that consumers who may buy a pirated tape or disc have no reason to suspect they are not buying a legitimate product.

Second, a compensation system should only reward those who would stand to lose other opportunities to market programs being taped by home users. A movie producer whose product is shown on network TV might reasonably be expected to take advantage of secondary markets at some subsequent point. Independent TV stations, cable local origination channels, and prerecorded disc or tape distribution comprise some of these markets.

Senator **DeConcini**. Excuse me, Mr. Waz. I am very sorry to interrupt you. We have a vote on, and the 7-minute bell just went off, so we will have to be excused for about 10 minutes. We will just take a little recess here and be right back.

Mr. **Waz**. Very good. Thank you.

[Recess taken.]

Senator **DeConcini**. The committee will come to order, please.

Mr. Waz, we apologize. It may happen again this afternoon for our other witnesses. Would you please continue?

Mr. **Waz**. Fine. Thank you, Senator.

I was going to raise a second consumer issue that would be implicated in any attempt to draft a reasonable compensation system, and that is that a compensation system should only reward those who would stand to lose other opportunities to market the program being taped by home users.

A movie producer whose product was shown on network TV might reasonably be expected to take advantage of some secondary market at a subsequent point. Independent TV stations, cable local origination channels, and prerecorded disc or tape distribution comprise some of these markets. Therefore, the movie producer might have an interest to be protected through this compensation mechanism.

By contrast, a sports team which holds the copyright to its regular season ball games may have no secondary market which it could reasonably be expected to exploit in future—for example, tape-delayed TV showings at a substantially later period or commercial videotape distribution. Therefore, this particular copyright holder may suffer no loss whatsoever from home videotaping.

A third point is that any process to determine the level of royalties to be paid should have effective public scrutiny or legislative oversight. The process of establishing compensation levels should not resemble the closed-door negotiations between the cable and broadcast TV industries over compulsory licenses and syndicated exclusivity.

A similar bargaining session between the tape equipment industry and producers which leaves consumers out of the equation could adversely affect consumer choice through artificially restricting the availability of programing and could boost the cost to viewers.

The proper way to set compensation levels and protect consumers' interest is through an administrative or legislative process which includes full and effective participation by affected consumer groups.

It is reasonable and consistent for consumers to desire the convenience of home video recording and the benefits of choice that come from an expanding marketplace and from fair and equitable compensation to producers and artists.

There is no desire on the part of consumers to kill the golden video goose, but there is clearly a need for a new copyright regime to accommodate the proliferation of consumer electronics.

The issues are not unique to home video recorders. Important questions about the entitlement of consumers to receive and use programing transmitted over the air and the entitlement of producers to be paid for these uses also arise in the context of backyard satellite earth receive-only stations, receiving and decoding equipment for subscription TV and multipoint distribution service transmissions, and home audiotaping of radio music broadcasts. Both the Copyright Act of 1976 and the far more antiquated Communications Act of 1934 have thus far been inadequate to deal with these many new problems.

We urge the Congress to put an end to the perception that home videotaping is in any sense criminal. This bill satisfies that goal. However, Congress should treat this bill as an interim measure, prefacing an attempt to come to grips with the new media and their many legal implications.

An approach which attempts to render new technological breakthroughs illegal is ill-advised and probably unenforceable. Wherever possible, Congress should avoid reducing these problems to considerations of legality of consumer use and rather look to the methods of just compensation to artists and producers if their interests are demonstrably affected.

NCCB again thanks the committee for the opportunity to discuss these important issues. I would be pleased to answer any questions.

Senator DECONCINI. Mr. Waz, thank you very much. I have a couple of questions, and then I will yield to my colleagues here.

Under the current situation we have before us today, home video recording off the air is illegal, and the Government does not seem to be able to enforce any such violation. The result, in my opinion, is another situation in which the Government appears inept because it cannot enforce its own laws. Many honest Americans are put in the position of having to choose whether to ignore the law, therefore breaking down everyone's respect for the law.

Would you like to comment on this statement and what you feel the situation is as to the honest Americans who would like to obey the law? What do you think they are going to do?

Mr. WAZ. Well, sir, when one has available to one a consumer technology of this nature that either makes it more convenient or more cost effective to acquire programing in a fashion other than what might be called traditional marketplace channels—the incentive is to make use of such a product.

The question of unenforceability, however, I think is the biggest drawback in any suggestion by the ninth circuit; and, of course, the suggestion of an injunction against recording equipment was only one of many possible remedies that the ninth circuit suggested the lower court consider on remand.

I do believe that, again, if there is any demonstrable loss on the part of copyright holders, their rights, just as the rights of the viewer, merit protection, because the marketplace can be adversely affected, and that in turn results in reductions of consumer choice.

On the other hand, anything that would resemble a punitive tax on equipment or tapes would not be effective for the industry, would be unenforceable, and would give greater incentive to consumers to find other ways to circumvent reasonable legal restrictions. Consequently, that is why I do believe the royalty compensation tax, if a compensation method is necessary, would be most usable, most enforceable, and most effective.

Senator DECONCINI. One great concern I have with this whole idea of taking away the public's ability to finally gain some control over their television viewing is that this technology finally seemed to afford to parents an ability to control what their young children view on television. Through the use of video recorders, parents, for the first time that I know of, except by turning it off, could prescreen what their children view.

Have you heard of any other consumer groups or organizations that are concerned about this issue as it relates to children's viewing television, and do you have any comments regarding that aspect?

Mr. WAZ. There are an array of national and local organizations that are extraordinarily concerned with the quality of children's programing and the parent/child relationship in the viewing of such programing. I am sure Peggy Charren of Action for Children's Television in Boston would be an effective and forceable spokesperson for the parents' interest on that particular issue.

By the same token, I know the organization Morality in Media is particularly concerned with cable programing entering the home, as is the Coalition for Better Television. Groups across the spectrum are seriously concerned with that.

There are some protections available, particularly through cable—the so-called lock box that allows the television to be used for all channels except those that might contain programing potentially offensive to particular viewers or not suitable for viewing by children. These lock boxes which are sometimes standard equipment, perhaps not frequently enough, on cable systems allow the parent to make those channels effectively off limits.

Senator DeConcini. Thank you, Mr. Waz.

Senator D'Amato, do you have any questions?

Senator D'Amato. Thank you, Mr. Chairman. Yes, just one.

You discuss as a possibility placing a tax on the tapes or cassettes for sale. Is that correct?

Mr. Waz. Yes.

Senator D'Amato. Are you aware if there is any tax that exists, for example, on audio tapes?

Mr. Waz. Currently in the United States there is none. I do know that such remedies have been placed into operation in other countries.

Senator D'Amato. That being the case—there being no tax placed on audio tapes which are used for home recording—why would you think it would be proper to indulge in placing a tax on those tapes that would be used for home recording of video? Is there a distinction between audio and video? Do you think they should be treated differently?

Mr. Waz. If there were any distinction to be made—and if I were to look at industry figures, such as from the Recording Industry Association of America—I would expect that home audio taping far outstrips the amount of home videotaping going on and perhaps as a percentage of revenue. Again, if there is a demonstrable link between a loss of revenue and home taping, there may be a serious issue to be considered here.

Senator D'Amato. If one industry that is utilizing the taping at home—and we are talking about audio now, and far more than 3 million tape recorders than there are video at this point in time—would it not be discriminatory to even consider placing a tax on video recording as opposed to audio recording? We have accepted, and it has been written into the law, that they will be exempt. There is no copyright infringement. Is that correct?

Mr. Waz. That is correct.

Senator D'Amato. If we evolve a policy that people should have a right to record that which enters into their home, why would we then move to place some kind of tax on the tapes?

Mr. Waz. The tax suggestion I make is in the broader context of examining the impact of all home consumer technologies on the video programing marketplace. I do stand behind the bill that is being considered today, S. 1758, as an important remedial measure that will at this time remove any uncertainty about home recording.

However, the proliferation of this equipment does raise some realistic questions, some of which do deserve an airing and do deserve the development of an objective evidentiary basis rather than a taping industry throwing its facts at the other facts being developed by the production industry. The entire question does merit an airing where consumers, as I also suggested, may also have an active role.

Senator D'Amato. But you do support S. 1758 as it presently stands?

Mr. Waz. I do. I would recommend solely that any legislative intent that may accompany the bill would make it clear that Congress, as always, would be vigilant in terms of the concerns of copyright holders.

Senator **D'Amato**. Thank you, Mr. Chairman.

Senator **DeConcini**. Congressman, do you care to make any statement?

Mr. **Parris**. I have just one very brief question, Senator.

I would like to pursue what Senator D'Amato was driving at, as I understand it. If I could be presumptuous enough to summarize your statement, you express legitimate concerns about fair compensation on these other questions, but you do support the concept that is implicit here—to separate those issues from the question of the consumer use of owned equipment for personal use—and do support strongly the adoption of this legislation at this time as an initial step. Is that correct?

Mr. **Waz**. That is correct. I would say that is essentially correct.

Mr. **Parris**. Thank you.

Senator **DeConcini**. Thank you very much, Mr. Waz. We appreciate your testimony. You have been very helpful to us.

Mr. **Waz**. Thank you.

Senator **DeConcini**. At this time in the record I would like to submit a letter dated November 25, 1981, from Senator Mathias to Senator Thurmond, supporting the legislation, with some caveats. It will appear in the record, without objection, at this point.

[Material follows:]

U.S. Senate,
Committee on the Judiciary,
Washington, D.C., November 25, 1981.

Hon. Strom Thurmond,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, D.C.

Dear Strom: My long-time interest in intellectual property is well known to you. While I am in sympathy with the general thrust of Senator DeConcini's bill to permit home recording for private use, I feel strongly that rights in intellectual property should be protected. To that end, I have drafted an amendment to S. 1758 that would provide some protection to those whose creative property is recorded, and assure that the home recording privilege does not unfairly abuse the rights of property owners. I will circulate my amendment later this week.

As you know, I will not be able to attend the first hearing on November 30, but I did want to make the Committee aware of my interest in this matter and my intention to introduce an amendment to S. 1758 that I consider necessary and appropriate. I understand that we will have an opportunity to hear additional testimony on this very important issue early next year, and I look forward to working with you to hammer out a bill that is fair to all concerned.

With best wishes,
Sincerely,

Charles McC. Mathias, Jr.,
U.S. Senator.

Senator **DeConcini**. Our next witness will be Mr. Friedman.

Senator D'Amato, would you like to introduce your constituent? We appreciate having him here.

Senator **D'Amato**. Thank you very much, Mr. Chairman. It is my distinct privilege to present to the committee Prof. Leon Friedman, who is a distinguished professor of law at Hofstra University, where he is one of the leading experts in constitutional law.

It is indeed a great pleasure to have you here, and we welcome you and thank you for having taken of your time, Professor Friedman, to prepare your testimony and give it to this committee.

Mr. **Friedman**. Thank you, Senator D'Amato.

Senator **DeConcini**. Thank you, Senator.

STATEMENT OF LEON FRIEDMAN, PROFESSOR OF LAW, HOFSTRA UNIVERSITY LAW SCHOOL

Mr. Friedman. Mr. Chairman, I do have a statement which I would like to have inserted in the record.

Senator DeConcini. Without objection, that will be included in the record.

Mr. Friedman. I will be very brief. I will just try to summarize what my statement says.

I believe that S. 1758 is both an appropriate remedy for Congress to take at this point and that it is a desirable response to the ninth circuit decision in Universal City Studios.

I think it is appropriate for Congress to act at this point, because basically what both the district court and the court of appeals did was try to guess at what Congress' intention was in enacting the 1976 revisions.

Practically nothing is said in the legislative history about videotape recording. There was some brief legislative history that was outlined by the district court judge, Judge Ferguson, when he talked about the 1971 amendments relating to section 1(f) of the old law. But if you look through the legislative history and look through the statute itself, you will find that there is simply no discussion of the new technology in videotape recording.

Both the district court judge and the court of appeals had to guess at what Congress had in mind. Did they intend to have this videotape recording as an act of infringement? Did they intend that the fair use doctrine would cover this home recording?

Their guess and the guess of the district court and the guess of the court of appeals can only be supplemented by a guess of the U.S. Supreme Court if they go up on appeal. But if they are simply dealing with the same legislative history, which is practically nonexistent under the 1976 law, it seems to me entirely appropriate for Congress to come in and say, "Here's what we really intended, or here's what we really want out of this situation."

The court decisions are not a constitutional interpretation of the copyright clause of the Constitution. They are trying to guess at what the operative statute means in respect to an entirely new technology involving billions of dollars, involving millions of consumers at home trying to deal with this technology, and there simply is not an adequate legislative base for dealing with this problem.

It seems to me that Congress can come in at any time—after the district court decision, before it came down, after the court of appeals has issued its opinion—and say, "Here's what we really have in mind. Here are the kind of exemptions we think really should exist in the law."

If you will look at the existing statute, you will see that Congress has already stepped in in a variety of situations and said, "As far as infringement is concerned, we want this to be totally exempt."

Under section 110 of the law they list nine exemptions. If you will look at the very heading of section 110, you will see that it says, "Notwithstanding the provisions of section 106"—section 106 was the basis of the court of appeals decision—"the following are not infringements of copyright." Then they add nine areas—certain kinds of educational use, certain kinds of use of music in a religious ceremony, certain kinds of transmissions for educational or governmental use. There are nine separate areas where, notwithstanding the broad grant of right of copyright owners under section 106, Congress said it does not want the following uses to be considered infringement of copyright.

There are a whole group of other areas—section 112 dealing with cable, section 118 dealing with other kinds of uses—in which they have determined that they want certain kinds of compulsory licenses to be issued.

The whole section 115 on compulsory licenses for records was an example of Congress stepping in and saying,

> These would otherwise be an example of an infringement. We do not want it to be an infringement because of other purposes served by these uses, and either we want a low amount of money to be paid or no amount of money to be paid for this particular kind of use.

I think the closest analogy is in section 504(c)(2) statutory damage provisions, where they say as to librarians and people who work in archives or schools,

> If they make excessive photocopying, photocopying that they think would be fair use but a court later determines is not fair use, we do not want them to pay even the $100 statutory minimum provided by the statute.

So we have a whole series of examples in the statute already where Congress has exempted certain uses as infringements or said, "We don't want damages to be paid at all, or if damages or royalties are to be paid they have to be paid at an absolute minimum amount." So S. 1758 just fits right in to what is already found in the statute and indicates where Congress intended it does not want certain acts to be considered infringements.

I think it is also appropriate, because there is simply a total lack of statutory materials dealing with this issue under the existing law.

Now, is it desirable to pass this legislation? Is it desirable to exempt home video recording from the reach of the copyright law? I think it is an entirely desirable response by Congress to the ninth circuit decision, and I think for two related reasons.

One is that, no matter how you measure it, you are going to have to go into the home to determine who, or how, or why, or how often this recording takes place. The court of appeals made no attempt at all to come in to fashion a remedy. They remanded it back to the district court, and they indicated that the district court judge should look at statutory damages.

The statutory damage vehicle says it is either between $100 and $10,000 per act of infringement, and apparently that is to be paid either by the consumer each time he records or by Sony as the contributory infringer, but it is per act of infringement.

If we talk about the hundreds or even thousands of acts of infringement, the act of infringement being the recording and the replay at a later time and whether Sony stands in the shoes of the consumer or the consumer has to pay it itself, there is simply an enormous, totally unforeseen liability in this sort of area.

One way or another, Congress has to do something. The existing damage provision is totally inadequate for dealing with this mass, these thousands of infringements or potentially millions of infringements when you think of how many people own this equipment, that we have here.

Congress has to step in one way or another to provide for the mechanism. The current mechanism is too clumsy and too cumbersome to deal with this kind of a situation. Of the various mechanisms that are available, it seems to me, largely because of the privacy issue that we are concerned about, that the mechanism they should come in and say is, "No infringement. We do not consider this an act of infringement. It fits exactly into the sort of provision already in the law, one dealing with home recording of records off the air and the other the whole series of provisions we find in 110 and 504(c)(2)."

It seems to me that if a librarian should be let off scot free for making too many photocopies of a copyrighted document, the consumer making it for his own home use should absolutely be let off scot free for making that kind of use for his own personal pleasure.

For those reasons, I think that S. 1758 is within Congress power. It is an appropriate use of Congress power, and it is a desirable use of Congress power.

Senator **DeConcini**. Professor, thank you very much.

As a matter of fact, looking at the court cases, certainly it is clear to me, and I believe that is what you are saying too, the courts are almost begging Congress to do something here.

I notice in the opinion of the district court, the court said that the courts recognize that the resolution of these issues is preeminently a problem for Congress and possible intermediate solutions are also the pragmatic kind legislatures, not courts, can and should fashion.

Then of course the ninth circuit, as you pointed out, said that exemptions from the normal workings of the copyright scheme involve a public policy determination. These are permanently decisions for Congress and not the courts. So it falls right in line with your testimony that Congress has to do something, whatever it is. We need to act.

My question to you is this. Probably we ought to be acting in far greater depth, too, in other areas, but this bill is before us because of this decision. Would you recommend that the appropriate committees look at this whole area of copyright and what technological advances have posed to the problems of this act and the parties involved in it?

Mr. **Friedman**. Absolutely. It is not unusual for Congress to take two bites of the apple. I was involved in a whole issue about the Nixon papers where first Congress dealt with the immediate problem in front of them when Richard Nixon was running off with all his tapes and papers, and they said, "No, just a second; we don't want you to do that; we want control of those tapes and papers." They passed a law in 1974 to control that. Then they passed a more general law dealing with Presidential Papers for all Presidents thereafter, the Presidential Records Act of 1978.

So Congress has often faced the situation where there is an immediate problem which they have to resolve right at the time, because otherwise some bad thing will happen, but it just leaves open a more general dealing with this kind of an issue, which requires a little more time, a little more consideration, and I think that certainly is the kind of response that the ninth circuit decision requires.

Senator **DeConcini**. One last question, just out of curiosity for myself. I would like to have your views. Would you explain to us as a professor of law what you believe the ultimate purpose behind the copyright laws were? What is your legal perception of what was behind that?

Mr. **Friedman**. The constitutional provision says that Congress has the power to pass laws to give to authors and scientists for a limited time the benefit of their writings and inventions. So ultimately the copyright law is there to give to the author of a creative work some economic benefit from his labor for a limited time.

Senator **DeConcini**. How is that best effectuated in your opinion? What is the best way to do just that?

Mr. **Friedman**. The copyright law has provided an elaborate mechanism for protecting the authors or the creators of any of these works. They do get the benefit of their contracts with producers when their show goes on television. They write a book, and that becomes a movie. They will get the benefit of the dollars from the movie producer.

I will say this: The movie producers are not running to give authors a share of the video cassette market. So the idea that the authors would share in this is simply not the case. We just saw that there were a couple of strikes in which both the writers and directors got only a minimal share of this market.

There has not been a mechanism for giving anything to the author, the original creator of this. Of course the directors do share in that; they do make their own creative contribution, but they are getting their money from deals with the networks, and the idea that they must reap a huge benefit—a much greater benefit—out of the exploitation of the video cassette recorder does not follow at all from the constitutional requirement.

It seems to me this would be a huge windfall for the producers in this area, the markets that actually create the movies, and not contemplated by the law at all.

As to the way in which this could be enforced, with huge amounts of money going either from the consumer or from Sony, the contributory infringer, as the court said, it seems to me the authors are getting their share from the initial production of the film and it is not fair for the producer to whom they sold their right to get this huge windfall that the ninth circuit case contemplates.

Senator **DeConcini**. Thank you very much, Professor Friedman. We appreciate having you here.

Senator D'Amato, do you have any questions?

Senator **D'Amato**. Mr. Chairman, I think it is important for the record to note that neither the chairman, Senator DeConcini, nor Senator D'Amato attended Hofstra Law School.

Professor, there have been those who have said that this legislation is premature, that indeed before Congress acts we should wait until the Supreme Court reviews this matter. Would you care to comment in respect to those who allege that this is precipitous—that S. 1758 should not be advanced until the Supreme Court has acted?

Mr. **Friedman**. As Senator DeConcini said, we already have a situation where the statutory materials are really not available. It is a guess one way or another: Did Congress intend that video recording would be an infringement, or did they intend that the broad, fair use provision, section 107, really protects this?

Both the lower courts were simply guessing at rather broad language in two separate sections. The court of appeals relied on section 106, which gave the copyright owner very broad control of his material. The district court judge relied on section 107, which has a very broad definition of "fair use."

The materials on which to determine what Congress intended are not there. The Supreme Court would just look into the crystal ball, like both other courts have done, and try and guess at what Congress intended. If Congress intends one thing or another, it can tell the Supreme Court, it can tell the Federal court, "Here's what we really had in mind."

Senator **D'Amato**. So you reject that contention that we should wait for the Supreme Court to act?

Mr. **Friedman**. No, because the Supreme Court is not going to determine a remedy. Congress has to determine a remedy.

Senator **D'Amato**. In any event, even if we determine that there is a violation of some copyright law, then comes the matter of enforcement and the rest, as you have spelled out.

Mr. **Friedman**. The equipment is simply not there. The statutory materials are simply not there. Congress has to do something, one way or another.

Senator **D'Amato**. In your analysis of S. 1758, Professor, did you indicate, or does it appear to you, that the enforcement of S. 1758 would in any way work a hardship on, for example, the authors or the producers?

Mr. **Friedman**. Well, it is going to work a hardship on the producers, because they are not going to get a huge windfall.

Senator **D'Amato**. But would it work a hardship on them?

Mr. **Friedman**. No, I do not see how it would work any hardship on them. They have already made their deals with the television networks, with everyone else, with syndicators, or whatever. This is a total windfall for them, one way or another.

Senator **D'Amato**. Does it work a hardship on the writers, the authors, et cetera?

Mr. **Friedman**. As I said, there was a strike this summer in which the writers ended up with a very small amount of the total coming in, and mostly I believe from the actual sale of video cassettes over the counter.

Senator **D'Amato**. But S. 1758 in itself would not work a hardship on them?

Mr. **Friedman**. No, it would not work a hardship on them at all.

Senator **D'Amato**. Thank you very much, Professor.

I have no further questions, Mr. Chairman.

Senator **DeConcini**. Congressman, do you wish to make a statement?

Mr. **Parris**. I have just one very quick question, Senator.

Would you agree with the statement that the adoption of this legislation would render the question of individual use by the Supreme Court, the ninth circuit, or whoever—would render that moot and that the adoption of this legislation would be, in effect, even an appropriate delinkage of the mechanism of the profoundly more complex issues of payments of royalties, the entertainment fees, and all those questions, as opposed to individual use of this equipment? Would that be an effective way to approach it?

Mr. FRIEDMAN. It would be effective. Let me just, if I can, act professorial for a moment. There is some technical gap in the legislation. The one thing it does not cover is if there is a performance under State law which is not being simultaneously recorded, so that there is no Federal statutory copyright protection. There still may be enforcement under State misappropriation laws.

I think there should be an additional technical amendment to make sure that any home video recording of any kind is neither a violation of copyright nor of any State statutory or common law. That would simply eliminate that issue. The home video recording would simply not be actionable under the laws of either the Federal Government or of any State. Then Congress can come in and make a more appropriate examination of the technologies and determine what it thinks would be desirable over the long run.

Mr. PARRIS. But do you think we should limit it just to the home? How about the priest who wants to watch the Notre Dame replays on Sunday morning during mass? He wants to do that on the next Saturday night in his office, for example.

Mr. FRIEDMAN. There is a definition for public performance in the statute which talks about,

> To publicly perform the work is to perform or to display it at a place open to the public or in any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.

I think you can simply plug in that definition. If there is a normal circle of social acquaintances, that is what we are talking about, but that already exists within the statute, and that might be plugged into this situation.

Mr. PARRIS. Thank you.

Senator DECONCINI. Thank you very much, Professor Friedman. We appreciate your enthusiastic analysis of this legislation and Congress' involvement in it. It has been very helpful to us.

Mr. FRIEDMAN. Thank you very much.

[Material follows:]

TESTIMONY OF

PROFESSOR LEON FRIEDMAN
HOFSTRA LAW SCHOOL

My name is Leon Friedman and I welcome the opportunity to testify this afternoon on S.1758, a bill that would overrule the recent decision of the Ninth Circuit Court of Appeals in Universal City Studios v. Sony Corp. of America, 659 F.2d 963 (1981.

I am a professor of law at Hofstra Law School in Hempstead, New York. I teach copyright law and have practiced in the field for over 20 years. I have also lectured on copyright law to federal judges through the auspices of the Federal Judicial Center. I believe that S.1758 is both an appropriate remedy for Congress to enact and it is a desirable response to the court decision.

The Decision

The Universal City Studios decision held that off-the-air copying of copyrighted television programs by videotape recorders constituted copyright infringement even if the copying was done by private persons for their own non-commercial use. The Court of Appeals reversed an earlier decision by Judge Ferguson reported at 480 F.Supp. 429 (C.D. Calif. 1979) which held that videotape recording by private consumers constituted fair use and/in any event the manufacturers of such equipment were not contributory infringers The Court of Appeals, relying on the absence of any language in the copyright law or legislative history relating to private home video recording, concluded that such copying could not be fair use. It held that the broad grant of monopoly rights to copyright owners under Section 106 of the law, in particular, par. 1 which gave such owners the right to "reproduce the copyrighted work in copies or phonorecords," dictated a finding of infringement. It viewed the problem differently than the district court: the question was not whether Congress showed any intent "to protect copyright holders from certain reproduction of his works." Rather the question was whether "Congress...exhibited the intent to limit the rights of copyright owners in ways not specified in §§107-118." 659 F.2d at 966. Finding no intent to limit the broad grant of rights under §106 or any indication that the fair use doctrine was meant to apply, it found for the plaintiff. It rejected any analogy in the photocopying area, particularly the Court of Claims decision in Williams & Wilkens Co. v. United States, 487 F.2d 1345 (Ct.Cl. 1973) aff'd by an equally divided court, 420 U.S. 376 (1975) which held that single-copy photocopying of a copyrighted article for personal use constituted fair use.

The court remanded the case for fashioning of an appropriate remedy which it recognized would be very difficult.

Congressional Action

It is entirely appropriate for Congress to step into the matter now and legislate a solution to the problems raised by the Court of Appeals decision. In the first place, the entire opinion is based upon statutory construction of the Copyright Law. The district court thought that Congress intended to allow private home videorecording under the broad definition of fair use. The Court of Appeals thought the Congress intended to grant copyright owners protection in this situation because of the broad grant of protection in Section 106. The Supreme Court can try to interpret or guess what Congress intended just as the lower courts did, based on the almost complete lack of statutory materials focusing on the issue. Or Congress can now tell the courts exactly what it wants to do about the question now since it apparently never focused on the issue when it passed the 1976 revision.

Secondly it is certainly appropriate for Congress to grant broad exemption under the copyright law to certain classes of users of copyrighted material. The copyright law already contains provisions for compulsory licenses and outright exemptions for persons who otherwise would be considered infringers. We have had a compulsary license for making records of copyrighted music for over 70 years, first in Section 1(e) of the 1909 law and now in Section 115 of the new law. Congress established a fee of 2 cents under the old law and 2-3/4 cents under the new law. Section 111 has a compulsary license provision for cable systems. Section 118 provides a special procedure for public broadcasting entities using certain types of literary works.

More to the point, the statute has specific exemptions for certain kinds of uses which would otherwise be considered an infringement. Section 110 begins broadly that "notwithstanding the provisions of section 106 the following are not infringements of copyright:" Then follows outright exemptions for educational uses of certain works, religious uses, uses for charitable solicitation, uses in non-profit agricultural or horticultural fairs, uses directed to blind or handicapped persons and so on. Even though the uses would otherwise violate Section 106 rights, Congress determined that the uses specified in Section 110 should be permitted.

Congress also specified other uses that would not lead to liability. In Section 504(c)(2) Congress established certain minimum and maximum levels for statutory damages. For innocent infringers -- those who did not know their acts were infringements -- the limits were $10,000 maximum to $100 minimum for all infringements of one work. But employees of libraries, schools or archives who made photocopies, thinking that it would be considered fair use but who were later found to be infringers are exempt from even the $100 minimum. (Since no profits are involved and it is difficult to determine actual damages, presumably such persons are totally exempt from any damage award).

Thus there already exists in the statute precisely the type of exemption contemplated by S.1758.

Reasons for the Proposed Bill

As for the wisdom or desirability of the bill, I believe it is an entirely reasonable response to the new technology. In some ways it fits precisely within the already existing exemption in Section 110(5) which exempts any "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes..." In other words the reception of the TV signal is not a performance of the work, nor should a single recording of it for private home use.

I think it is undesirable for the Ninth Circuit decision to stand for two related reasons:

(1) ultimately the courts must invade the privacy of the home to determine what uses are being made by a consumer;

(2) the measure of damages currently in force in the copyright law is totally unsuited to meet a finding of infringement in this type of situation.

Privacy: The Ninth Circuit decision finds that the recording of a copyrighted work by a videotape recorder is an infringement. Unlike the situation where a person buys a cassette of a film in a store and pays a royalty on the purchase, the decision requires a consumer to pay for what he does at home. No matter how ingenious a remedy can be worked out, it is still necessary to determine what programs a consumer records to allocate damages or royalties. This is an entirely undesirable extention of government intrusion into the home even for the best of reasons.

Remedy: The existing law simply cannot cope with the remedy now required after the Ninth Circuit decision. In theory each consumer must pay a minimum of $100 for each act of recording of each copyrighted show under Section 504(c)(2). Or Sony must pay that amount on their behalf and charge consumers additional amounts to cover that cost. Obviously that is an absurd measure. But the law has nothing else available to it. To say the courts may fashion a remedy is no answer. The courts can only fashion a remedy within existing law which has the $100 minimum per act of infringement. Congress must step into the situation one way or another. Either it must reject the decision or give a court other alternate damage remedies to cover this unusual situation. But it cannot stand idly by.

Senator DECONCINI. Is Senator Denton here?

Senator D'AMATO. I do not believe he is. He is on the Floor.

Senator DECONCINI. Our next panel of witnesses consists of Mr. Jack Wayman, senior vice president of Consumer Electronic Group; Mr. Joseph Lagore, president of Sony Consumer Products Co.; and Mr. Julius Kretzer, who will be introduced by Senator Denton.

Also, I have a statement from Senator Heflin welcoming you here, Mr. Kretzer.

Mr. Wayman is accompanied by Mr. Day. Is that correct?

Mr. WAYMAN. That is right, sir. He is our counsel.

Senator DECONCINI. Very good.

Mr. Wayman, would you please proceed?

Mr. WAYMAN. If we may, could we have Mr. Lagore go first?

Senator DECONCINI. Surely. Mr. Lagore, please go right ahead.

STATEMENT OF JOSEPH LAGORE, PRESIDENT, SONY CONSUMER PRODUCTS CO., ACCOMPANIED BY DEAN DUNLAVEY, COUNSEL; IRA GOMBERG, GENERAL COUNSEL; AND WILLIAM BAKER, VICE PRESIDENT, COMMUNICATIONS

Mr. LAGORE. Mr. Chairman, my name is Joseph Lagore, president of Sony Consumer Products Co., a division of Sony Corp. of America. I have been in the consumer electronics industry for more than 20 years, and for the past several years I have been responsible for marketing the Sony Betamax machine as well as other Sony products.

With me today is Mr. Dean Dunlavey, an attorney with Gibson, Dunn, Crutcher of Los Angeles. Also with me are Ira Gomberg, our general counsel, and Mr. William Baker, our vice president of communications.

Sony is very pleased to have this chance to testify here before this committee. The proposed legislation you are considering is, in our opinion, of great importance. It is important not only to our industry, but it is also very important, we believe, to consumers, small businessmen across the country, and to many others who benefit either directly or indirectly from the availability of this technology.

Additionally, the controversy that provides the basis for this proposed legislation raises questions affecting the privacy of all citizens of this country. Our paramount concerns are these:

One, the court ruling intrudes on the privacy of the American citizen in his own home. The hundreds of editorials, columns, cartoons, and other media comment supportive of the consumer's position in this matter have focused on this important aspect. This book beside me has that information [indicating book].

Two, what we are talking about here is videotaping for private, noncommercial use of programing broadcast over public airwaves. There are more than 1,000 publicly licensed television stations in existence today, and in excess of 1,500 more are planned for the immediate future. These stations provide literally millions of hours of programing, offering consumers a very wide choice. Under Federal law, these stations are required to serve the public interest, convenience, and necessity, and their broadcasts are for the use of the general public.

Why should consumers be forced to watch what is broadcast over public airwaves only at the time networks or the creators of these programs deem fit? Why should those who work during the day or during prime time be denied the opportunity to tape a program for viewing at another time? Surveys show that the majority of the people who own a Betamax use it primarily for this time shift capability.

Three, we should not lose sight of the fact that many copyright holders, including sports, educational, religious, and entertainment producers, are all on record in court documents that they have no objection to consumers privately recording their presentations for home use.

Indeed, aside from Universal and Walt Disney, no one else in the entire movie industry has been concerned enough to bring suit, complain to Sony, or identify themselves with the suit that resulted in this court ruling, and Disney Productions has now dropped a subsequent suit against all other VCR manufacturers and distributors, a suit currently being pursued by Universal alone.

Four, we are talking about a product that contributes an estimated $3 billion annually to the American economy, and this figure is growing. It allows viewers to record educational, informational, and religious programs. With the addition of a portable camera, it enables consumers to make home movies. In short, it enriches the quality of life of millions of Americans.

Sony's tape plant in Alabama employs 1,800 of the 6,000 men and women who work for our company in America. They make a significant percentage of the 25 to 30 million videotapes sold in the United States each year. But other companies are also involved in tape manufacturing, and if this industry were curtailed the job losses could be significant.

Five, allowing the current legal ruling to stand without needed clarification means that consumers who own or use VCR equipment are considered as law breakers and could conceivably be subjected to recall of their machines.

While Universal in its public statements has expressed no interest in harassing consumers, in the courts it has demanded an injunction against further sales of new machines and even asked for a recall of all the machines already sold to consumers. Consider the job implications for dealers, shippers, sales personnel, and many others if the court grants these demands.

Six, to ban this equipment would surely have a dangerously negative impact on technological innovation and development in this country. Traditionally, when a product is banned or restricted in its use, it is because it has been found harmful to the user. In the present case, no harm of any kind has been demonstrated to consumers or to any other industry, only benefits.

Sony has pioneered in this field since it created the first home videotape recorder in 1965. Through 1971, when we introduced the U-matic video recorder, up to the present Betamax format, which was introduced in 1975, our capital investment in R. & D. has been considerable. So has that of the many other companies now in the field.

From the first, our technology has been well received and very much utilized by the entertainment industry. Some say it has revolutionized the communications field. In any case, it has proven very useful and popular with both commercial users and the public. Why then, one might ask, did it take 11 years after home video recording was introduced for these two studios to try to stop this technology?

Thank you for your generous time today. I think you sense how concerned we at Sony Corp. of America are about all the complex implications of this matter. We feel convinced we have a quality product that serves the interests of millions of consumers, broadens their freedom, and grants them full use and enjoyment of the public airwaves.

At the same time, even our adversaries admit that this product has harmed no one and has caused no one a loss of revenue. I hope you will act favorably on this remedial legislation and act upon it quickly, so that this serious but in our opinion quite unjust problem may be solved.

Thank you.[1]

Senator DECONCINI. Thank you, Mr. Lagore.

At this time I will yield to the Senator from Alabama to introduce Mr. Kretzer.

COMMENDATION OF WITNESS

Senator DENTON. Thank you very much, Mr. Chairman.

One of the real pleasures of serving in this office is the opportunity it provides for working with men like the one sitting in front of me today.

Mr. Julius Kretzer is an Alabamian and a Mobilian. I am from that town, and over the years I have admired him as he has helped maintain and improve our city. As a successful businessman and an active community leader, he embodies the highest standards of business integrity and good citizenship.

I want to take a minute today to say more, Mr. Chairman, than just welcome to Julie Kretzer. Since his statement mentions freedoms, I believe that committee members should know something of the measure of this man's demonstrated commitment to preserving our freedoms.

During World War II, Julie Kretzer was a combat medic who saw action in France and Germany. He also served in Russia. He took part in the Battle of the Bulge and was wounded and lost his leg in Germany in 1945. He returned to the United States, a decorated hero, and began the years of hard work that would lead him to success as one of my city's industrious businessmen.

He is currently the president of Kretzer, Inc., and the president of Mobile Downtown Unlimited, a major city development nonprofit organization.

As a community servant, he is both a member of the chamber of commerce and a director of the Diabetes Association. Professionally, he has served as the director of the Mobile chapter of the Sales and Marketing Executives and, today, is before this committee in his capacity as president of the National Association of Retail Dealers of America.

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[1] Mr. Lagore's voluminous prepared statement can be found at the close of today's hearing as appendix A on page 165.

I believe that he is uniquely qualified to express the concerns of the retailers of video cassettes and recorders. I want to welcome Julie to Washington and commend him to you, Mr. Chairman, and to this committee.

Senator DeConcini. Senator Denton, thank you.

I also have a note, Mr. Kretzer—you are a very popular man down there—from Senator Heflin, who is in Alabama today, regretting and expressing his disappointment that he cannot be here to join Senator Denton in presenting you to the Judiciary Committee. He points out your community activities and as a business leader in the State and in the community of Mobile, and he asks me to express his regrets that he cannot be here.

Senator Denton. Mr. Chairman, would you excuse me? I have just been informed that I have to offer an amendment now on the floor.

I must ask that I not hear you. I have read your statement, Mr. Kretzer. I will see you later.

Senator DeConcini. Senator Denton, that would be fine. Maybe you can hold the vote off for a couple of hours. That would be just great.

Senator Denton. All right. I will do my best.

Senator DeConcini. Thank you.

Who wants to go next? Mr. Wayman.

STATEMENT OF JACK WAYMAN, SENIOR VICE PRESIDENT, CONSUMER ELECTRONICS GROUP, ACCOMPANIED BY J. EDWARD DAY, SPECIAL COUNSEL

Mr. Wayman. Thank you, Senator.

In the interests of time, I am going to take just a few minutes from my prepared statement, Senator. My name is Jack Wayman. I am senior vice president of the Consumer Electronics Group of the 56-year-old Electronic Industries Association, which has its headquarters here in Washington. With me is our long-time special counsel, J. Edward Day. He is a partner of the law firm of Squire, Sanders, and Dempsey.

We are a trade association for manufacturers and sellers at the manufacturer's level of consumer electronic products. These include television receivers, radios, tape recorders, audio systems, phonographs, video cassette recorders—the so-called VCR's; by the way, that is the same thing as a videotape recorder, a VTC—and we represent other consumer products.

Our membership consists not only of all the major domestic manufacturers but most of the leading foreign-controlled manufacturers which have facilities here in the United States.

Our member companies, which include General Electric, RCA, Zenith, and many others, account for well over 95 percent of the sales of these VCR's we are discussing today and 95 percent of the sales of blank videotape, both at the manufacturer's level.

The purpose of our testimony today is to urge that VCR recordings of copyrighted materials off the air, when intended only for private, noncommercial use, do not constitute copyright infringement as is the case, with congressional approval, for home recordings of copyrighted sound-only audio materials.

We seek to have Congress overturn the potentially disastrous effect of the recent decision of the U.S. Court of Appeals for the Ninth Circuit in the case of *Universal City Studios, Inc.* v. *Sony Corporation of America,* the so-called *Sony* case, which reversed the opinion of the lower court. This *Sony* case has already been in the courts for 5 years, and with further court proceedings underway it could remain there for a long time.

We seek legislative relief to avoid the possibility of a long period of uncertainty and confusion while this matter inches its way through the judicial process.

Let us talk about some facts about VCR's and their use. There are almost 3 million VCR's in American homes, which means access for about 10 million people. In 1978 the VCR sales to dealers was about 400,000 units. This year, in 1981, we expect that figure to reach 1.3 million units, a 200-percent increase over the 1978 figure.

The monetary value of the American public's investment in VCR's and related products exceeds $3 billion, though with limited profit for manufacturers, and this is due to the enormous research and development investment and a very strong competition which exists in our industry.

Time shifting is a benefit and not a detriment. Home videotaping occurs primarily for time shifting purposes. That is, if a consumer is unable to watch a program while it is being broadcast, he records it to watch at a more convenient time. Surveys indicate that 70 to 90 percent of all VCR owners use their VCR's primarily to view television programs that they could not otherwise have watched.

A. C. Nielsen and Arbitron, the two major rating services, support this view because they now include VCR use in their ratings as an additional, previously unavailable audience of viewers who could not otherwise have watched a program. This was brought out and stated in the FCC study in their 1980 status report on the video cassette industry.

Let me point out that fair analysis of VCR usage leads to an inevitable conclusion: Time shifting, the principal use of VCR's, economically benefits rather than injures copyright holders. Indeed, the lower court found no proof that any copyright holder is being damaged by this private copying.

We are not attempting to appeal the ninth circuit court decision to this committee, but we do believe the ninth circuit court decision violates the public interest by threatening to prohibit American consumers from utilizing and enjoying a product which significantly improves the quality of their lives. And we feel that certain far-reaching public policy issues such as this one should be resolved by Congress and not the courts.

In regard to the economics of the motion picture industry, we certainly favor any company or industry making all the money it can. But let me point out that the motion picture companies are already triple dippers in the economic pot, and some of them may want to become quadruple dippers at the expense of the consumer and the profit-squeezed consumer electronics industry.

When a new movie is made, a producing company releases it first for showing in theaters for their first dip and for a profit. Then, as a second dip, the company can relese the movie in exchange for generous payments, often 15 to 25 percent of wholesale, to a manufacturer of prerecorded tapes which sell at retail for between $50 and $100.

Then the movie company has a third dip—negotiated royalty arrangements to let the movie be shown on television. It is common knowledge that some of these movies are shown on the air dozens or even hundreds of times, some year after year, by broadcasters both large and small and by the networks, all with royalties paid to the motion picture company which owns the copyright.

The royalty paid by the broadcaster is subject to negotiation based on expected viewing audience. As already mentioned, because of the consumer convenience feature of time shifting, recording off the air for private, noncommercial use increases the broadcaster's viewing audience. Thus, copyright holders can negotiate for more revenue based on estimated larger audiences.

Instead of recognizing these advantages, some movie companies apparently want to take a fourth dip to in some way charge the consumer for off-the-air recording for purely private, noncommercial use.

However, we are now becoming convinced that Universal-MCA and perhaps other motion picture companies may not really be aiming for this fourth economic dip. We think what they may actually want is to put video cassette recorders completely out of business. This would be done by obtaining a court injunction against their use.

An injunction against the use which the court could impose would be cruel and unusual punishment in this situation. The injunction would apply, at the present time, to only one company selling at the manufacturer's level, Sony, but it might then apply nationwide not just to Sony but to retailers, distributors, and advertising agencies involved in selling the Sony VCR's. It could also affect companies who sell the Betamax VCR under their own brand names, as their source would be cut off.

With regard to the violation of right to privacy, not only does the ninth circuit court decision threaten the viability of a growing industry, but its ruling has had the sudden effect of overnight turning law-abiding citizens in almost 3 million American homes into lawbreakers. The ninth circuit decision threatens the privacy of millions of Americans.

As regards the economic effects of an injunction, there are an estimated 25,000 retail outlets selling VCR's and/or blank tapes in the United States. VCR's are the most popular product in our consumer electronics industry today. Each of the companies selling VCR's at the manufacturer's level has a marketing structure and a merchandising staff. They have advertising agencies, and in many cases there are representatives and distributors.

The economic havoc that an injunction would cause in the terms of profitability and unemployment is inconceivable.

With this background, we give you our reasons why an explicit amendment to the Copyright Act is essential.

One, we are threatened with a nationwide injunction which would be vindictive and discriminatory.

Two, if we are denied a rehearing by the ninth circuit court, we will of course ask the Supreme Court to consider an appeal. Important as this case is, we cannot be sure the Supreme Court will take our case.

Three, an appeal to the Supreme Court, even if accepted, would not be resolved for a year or more.

Four, in the meantime, in the ninth circuit at least, every person who is using a VCR to record copyrighted material off the air for private use is a law violator.

On this last point, the motion picture company plaintiffs in the lawsuit are trying to have it both ways. They say they are not interested in pursuing the individuals who are doing the recording with VCR's, but their whole case hinges on a claim that the people doing the recording for private use, are the lawbreakers.

This is because the whole exposure of the manufacturers and retailers to a possible injunction depends entirely on a contributory infringement—on that theory—and if there is no violation by the private tapers there can be no contributory violation.

What it boils down to is that Universal and Disney do not care if under their theory, millions of private tapers are breaking the law. They are only interested in getting and destroying the VCR manufacturing and merchandising industries.

This is not just a battle between two big industries—one, the movie companies, thriving from their triple dipping, and, on the other hand, the television manufacturing industry, threatened with loss of their most popular product. It is a consumer issue. The copyright laws, like all laws, are supposed to benefit the public at large.

The VCR user is not taping for commercial use. He is merely using a convenience that developing technology has made possible as a byproduct of television broadcasting. The copyright laws should face up to and adjust to the vast strides in technological advancement which have made time shifting possible. The copyright laws should not be used for greedy purposes, to hold back inventiveness and technological creativity.

We certainly urge the enactment of legislation to exempt from the copyright laws off-the-air VCR recordings for private, noncommercial use, of copyrighted material broadcast for television viewing.

Thank you, Senator.

Senator **DeConcini**. Thank you very much.

Mr. Kretzer.

STATEMENT OF JULIUS KRETZER, PRESIDENT, NATIONAL ASSOCIATION OF RETAIL DEALERS OF AMERICA

Mr. **Kretzer**. Thank you, Mr. Chairman.

I am a little awed by the introduction of Senator Denton. I do not know whether I can carry on.

Mr. Chairman, I am Julius Kretzer, president of Kretzer's Television Center, Inc., of Mobile, Ala. I am also president of the National Association of Retail Dealers of America, NARDA, an organization of approximately 3,600 members, who operate more than

10,000 retail outlets nationwide. NARDA members sell not only home entertainment products, but a variety of merchandise ranging from microwave ovens to refrigerators to electric toasters.

My brother and I own and operate two Kretzer's "Home Entertaintment Centers" in Mobile. Kretzer's sells a variety of electronics, including video cassette recorders and other video supplies, tape recorders, television sets, hi-fi products, calculators, video games, and electronic watches. We also service most of the products we sell and are in the business of selling and renting prerecorded tapes for use with video cassette recorders.

Sales of video cassette recorders and related products have become our No. 2 volume category, ranking second in sales to color televisions. Our sales of video cassette recorders totaled in excess of $380,000 in fiscal year 1981, a 56-percent increase over fiscal year 1980.

Revenues from the sale of video cassette recorders and related equipment amount to about 15 percent of our total sales volume, and I expect this percentage to increase substantially in 1982. Gentlemen, the experience of our stores, is typical of other retailers in our industry. We are not alone.

As a small business owner who depends on the sales of video cassette recorders and related equipment as a major portion of my business, I am extremely concerned about the recent ninth circuit court decision regarding off-the-air copying of telecasts of copyrighted programs by owners of videotape recorders.

This is clearly a product which the public wants, and one that benefits the small retailer, who is able to offer the specialized service which the product requires. In a sluggish economy, our business has remained good, and our sales force and service department have grown, thanks in large part to the public's demand for video recorders.

I appreciate the opportunity to testify before the committee on S. 1758, a bill to exempt the private, noncommercial recording of copyrighted works from copyright infringement. NARDA strongly supports this bill and urges that you take prompt, favorable action to report it to the Senate floor.

It is our belief that S. 1758 is needed so as not to deter the further development of what I believe to be an important product which has created and will sustain many jobs in manufacturing, distribution, and retailing and which will enable small retailers like ourselves to develop a specialized market with a product which has tremendous potential for consumer benefit.

Sales of video recorders are mushrooming. Industry figures which I have seen indicate that sales during 1981 alone will be about two-thirds of what they have been for the preceding 5 years combined. The Commerce Department reports that production during 1981 is up more than 75 percent over 1980.

I do not believe it to be an overstatement that the recent court decision could, if not superseded by S. 1758, severely retard development of this product and, with it, make it even more difficult for small retailers like myself to compete successfully in the marketplace.

As a retailer, I am at the everyday, day-to-day level of having direct consumer contact. In the first and final analysis, the consumer's interest and his rights under our system of free enterprise are paramount.

The ninth circuit court has, in effect, threatened Mr. and Mrs. America with severe penalties, as lawbreakers, for what they do in their own homes. As so-called consenting adults, they have freedoms which may or may not offend the personal views of their peers, but they would be denied the freedom of video time shifting as engaging in something illicit and criminal.

Mr. Chairman, as president of NARDA and with a candid admission of more than a casual interest in protecting our businesses in this very important area, I respectfully suggest that what is at stake here is something substantially more important, more fundamental, than the special interests of my retail colleagues, our manufacturing suppliers, or the industrial giants of the movie and entertainment world. The protection and preservation of the basic rights of the average citizen, the public interest if you please, is where we share an obligation that is both mutual and inescapable.

Gentlemen, your favorable action leading to the enactment of the legislation under consideration is, I truly believe, the proper way for you to fulfill your obligation.

Thank you.

Senator DECONCINI. Thank you, Mr. Kretzer.

Mr. Day, do you have any statement?

Mr. DAY. No, thank you.

Senator DECONCINI. You are a distinguished public servant and former Postmaster General, if I am correct.

Mr. DAY. Yes, sir.

Senator DECONCINI. We are very pleased to have you here.

Mr. Wayman, can you explain to this committee how the practice of time shifting of a television program by a video recorder could actually be of economic benefit to the copyright holder? You made some reference to that in your statement.

Mr. WAYMAN. I guess you generally have day workers and night workers, and those who would like to record a program in the day when they work at night, or vice versa, may set their video cassette recorder and record anything they would like to see off the air, and then they can view it at a time they desire. They can roll back the tape at any time, just like you do an audio tape, and have full view of the program.

Senator DECONCINI. So you mean by being able to do that, there is just more exposure of the copyright holder?

Mr. WAYMAN. Yes, that is right. As I stated, the copyright holders usually negotiate up front, if it is Hollywood for a movie, and based on what they estimate the share of the total viewing audience will be viewing that program.

Often it is now the case that some of those viewings are renegotiated based on the actual audience, because things can conflict with that audience or help out the audience, according to other competing programs.

This, as the FCC stated, should certainly be of benefit to the broadcasters and, in turn, be of benefit to the copyright holders, because they will be able to negotiate for a higher audience.

A VCR, with Arbitron and Nielsen into the new technology, is counted as a television set. If you are viewing one program and recording another—which you can do, by the way—Nielsen and Arbitron record you as having watched both programs—the fact that you will time shift the other one.

Senator DECONCINI. Often, I guess, on prime hours there is more than one selection a viewer would like to see.

Mr. WAYMAN. That is what the networks and the local stations like to do—compete with each other for good programing.

Senator DECONCINI. Could any of you inform the committee as to your knowledge of various new technologies which may soon be forthcoming in the area of electronic communications and also indicate to us what problems in the area of copyright would develop as a result of these new technologies? Are we just talking about the tip of the iceberg here? Is there something else that could be forthcoming, in your opinion?

Mr. WAYMAN. I do not know of anything right now. The television has become an active product. Someone said it was a vast wasteland. We think it is a verdant valley today. You have the ability to do home movies with this VCR. You are moving away from film technology to tape technology, and in a year or so you are going to see this—as we are doing today—use of cameras to record your own home movies. You can play prerecorded tapes on it. Also, the video disk is here, and that can also play copyrighted material. Certainly, those copyright holders have been well compensated.

We see nothing in our area in the foreseeable future. Projection television is here with us but has nothing to do with this case.

Senator DECONCINI. Maybe Mr. Lagore could answer this one. What is the feasibility of making a video recorder that can play over a conventional television set but would not be able to record off it?

Mr. LAGORE. Could I have the question again?

Senator DECONCINI. Yes. What is the feasibility of making a video recorder that can play over a conventional television set but would not be able to record off it?

Mr. LAGORE. You mean to be used as a playback unit only?

Senator DECONCINI. Yes.

Mr. LAGORE. We do not think it is feasible.

Senator DECONCINI. You do not think it is feasible? You have looked into that as a company?

Mr. LAGORE. Yes, we have.

Senator DECONCINI. What would be the cost involved in recalling the video recorders already in the possession of the American public and mechanically fixing them so that they would be subject to this limitation?

Mr. WAYMAN. You can answer it, Joe. We both know the answer to that one.

Mr. LAGORE. The cost would be astronomical—in the millions—and I do not think it technically could be done. I do not believe you can pull the tuners out of the sets. The electronics of the machines are related. I do not think it could be done.

Senator DECONCINI. You do not think it could be done, even if—

Mr. LAGORE. Well, perhaps at tremendous expense it could be done. Who would allow it?

Senator DECONCINI. Pardon?

Mr. **Lagore**. What consumer would allow it?

Senator **DeConcini**. I do not know. I ask the question to try to find out what the economic problems are here in the event that nothing is done and an injunction is granted or an order to order such action. I just wonder if your company or your industry has assessed what the damages could be.

Mr. **Kretzer**. I would like to add to that, Senator.

Senator **DeConcini**. Yes, please.

Mr. **Kretzer**. I think you would find a lot of law violators. I do not think people will voluntarily give up their ability to record.

Mr. **Wayman**. It is inconceivable, Senator, that this could ever happen or that we would even try to do it.

Senator **DeConcini**. You answered a question for me, Mr. Kretzer, that obviously the popularity of videotape recorders is mushrooming by sales. Is that true in your national organization, the National Association of Retail Dealers? Is that true all over?

Mr. **Kretzer**. Yes.

Senator **DeConcini**. They are a very popular item today?

Mr. **Kretzer**. I would say it is the difference between many businesses carrying on and probably going out of business today. It is a new life for them, and it is just inconceivable the number of units being sold, especially in your major markets.

Senator **DeConcini**. Thank you. I have no further questions. Senator D'Amato.

Senator **D'Amato**. Thank you, Mr. Chairman.

A number of the witnesses have testified that were the process to be continued or left in abeyance, there would be created as a result of this great uncertainty. We have heard about the fact that we are talking about people's rights and individual rights, but let us deal with the hypothetical that Congress does not act and this procedure is allowed to continue winding its way through the courts, and that in the absence of any clear legislative intent—as we have heard Professor Friedman testify that there appears to be that absence—and ultimately the circuit court's decision is affirmed, now we come to that situation of penalties or an attempt to bring about a cessation of the infringement of the copyrights.

I think Mr. Kretzer said it is inconceivable to think that people would allow, for example, their recorder to be tampered with—the 3 million that are now in homes and Lord knows how many if the procedure continues. That being the case—and I ask our esteemed counsel here—it would seem that the manufacturers would really come in for the onus, and the financial burden then would befall them as a result of the copyright infringements and their allowing these devices to be sold. Is that not true?

Mr. **Day**. Yes, I think it definitely is true, Senator. I think not only is there the burden that has been referred to of the enormous cost of trying to make an electronic alteration in the equipment that is out there, even if you could get access to it which is doubtful in many cases, but the consumer has a product which he bought with all good intentions, and somebody is going to have to compensate him for a loss of a very important feature of that product.

It is like somebody suddenly decided that you cannot have four-wheel brakes in your car anymore. If you are going to have those taken away, you are entitled to be compensated for the loss of that benefit.

Senator D'AMATO. Ultimately that damage that occurs will come down on the corporations that have manufactured these recording devices—Sony, RCA, et cetera. Does that not place the corporate structure at the present time in a somewhat precarious position?

It is one thing to say, "Well, we know it really won't take place. Something will take place. Congress will act on it." But is there a feeling of that precariousness and that uncertainty that you now have to deal with, which is one that takes on some very real financial responsibilities? Are you or will you be limiting some of your activities in this area if this situation is not dealt with expeditiously? Maybe Mr. Lagore could answer.

Mr. LAGORE. I do not think we are in any position to start reimbursing consumers.

Senator D'AMATO. We are not talking about reimbursing consumers. We are talking about if there is a failure of Congress to undertake the kind of remedial legislation necessary in this area. Does there develop some financial impact with respect to your company? What will you be doing? Will you continue in terms of your economic development and sales and distribution in the same manner as you would if this uncertainty were removed?

Mr. LAGORE. If there was an injunction, we would not be able to sell machines at all. Statutory damages would hurt us also.

Senator D'AMATO. So how concerned are you about this decision? What does it do? My gosh, I am feeding them up. These are slow pitches. [Laughter.]

Mr. LAGORE. Senator D'Amato, we are asking for help. We are very concerned.

Senator D'AMATO. Do not give me that, "We have to record them, fixing the recorders, blocking it off," and so on. What are the kinds of things that this does as a result of the uncertainty that is created in your industry? What kinds of economic consequences? Do you put your full force in? Are you striving to go ahead?

Are you striving, or do you see some limitations if this thing is not resolved in a year and if you see some real battle developing over here? Do you think this might impede your development, et cetera? Are there some financial considerations other than this business of having to buy back or make the change with the private recorders?

Mr. LAGORE. I think so. I think it could put some doubt in the mind of consumers about buying these machines.

Senator D'AMATO. Anything else in terms of the corporate side?

Mr. DAY. Yes, sir. There is definitely a discriminatory aspect in that if an injunction is issued in the near term, it affects only Sony and the other companies selling at the manufacturer's level who obtain their product from Sony, because it is the only manufacturer-level seller that is a defendant in the case.

It also affects the entire merchandising structure of all of these companies that are selling the Betamax, which goes right down through their home office, marketing, executives, assistants, distributors, dealers, all the way down. They would all be wiped out as far as this kind of product is concerned.

Senator D'AMATO. Let me ask you one more question. Suppose we go through the courts and you lose; the Supreme Court rules; Congress does not act. Now Congress sees this terrible inequity and injustice, but the Supreme Court has ruled against you and comes out with injunctive relief, et cetera, and says you have got to get these machines back, and of course you have indicated, as Mr. Day has mentioned, that those who have already been enjoined in this suit would feel the full impact.

Could Congress legally, ex poste facto, treat and cure that deficiency once the court has ruled? Does that not raise a question as to whether or not we can cure that deficiency once the Supreme Court may have acted, as it relates to what they might determine to be an infringement of those 3 million or whatever number are out there? Is that a question?

Mr. DAY. Yes. I think it is a big question and a big worry. I think it is a situation where the court should do, if they are going to decide against us, what they have done in other recent situations on occasion. That is to say, "This problem is bigger than both of us, and we ought to delay the effect of our decision until there has been a chance for Congress to take care of it."

They did that in connection with your savings accounts that pay interest. Although the court said the law at that time did not permit it, they said this was something that was so important that, "we ought to delay the effect of our decision until Congress has a chance to act on it." We would hope that, at a minimum, the courts would do that.

Senator D'AMATO. Thank you, Mr. Chairman.

Senator DECONCINI. Congressman Parris.

Mr. PARRIS. Mr. Chairman, I would just like to make this point. More of these units have been sold since the date of this decision than ever before in history. They have depleted the retail inventory. I think it is reasonable to assume that these criminals are not buying these things to grow flowers in; they are watching TV programs with them.

Let us face the incredible absurdity of this thing. I would like to correct with this question, if I could, a common misconception. The incredible absurdity is the question of the enforcement in the real world. I would just like to make one point on the complaint in this original case.

It says,

> The plaintiff does not seek relief against the six residents of California who are homeowners, but the plaintiff contends that such recordings constitute infringements of its copyrights.

Would one of you gentlemen like to comment on the fact of whether these plaintiffs here can gratuitously disenfranchise these people from the criminal penalties of an infringement case by saying they do not want to enforce it against those homeowners? Are they not actually acting contrary to law by the simple act of taping, regardless of this gratuitous comment by the plaintiff here?

Mr. WAYMAN. That is right, Congressman. In fact, I am looking at a trade press headline that came out several weeks ago: "MCA files suit against a slew of VCR manufacturers. Consumers taken off hook." They cannot take the consumer off the hook. The Ninth

Circuit Court has the consumer on the hook, and they cannot have it both ways, as I said in my testimony. They cannot go after the manufacturers that we represent as contributory infringers if there is not that primary infringer.

Mr. PARRIS. Thank you, Mr. Chairman.

Mr. DAY. In connection with that, Congressman Parris, back in 1971 when they were having congressional testimony on this subject, the representative of the Copyright Office at that time said that this was something that simply could not be controlled; it was unenforceable.

Mr. PARRIS. Thank you.

Senator DECONCINI. Thank you very much for your testimony, gentlemen. We appreciate the expertise and the manner in which it was presented.

[Prepared statement of Jack Wayman follows:]

TESTIMONY
OF
JACK WAYMAN
SENIOR VICE PRESIDENT
CONSUMER ELECTRONICS GROUP
ELECTRONIC INDUSTRIES ASSOCIATION

Description of Our Trade Association and its Membership

My name is Jack Wayman; I am Senior Vice President of the Consumer Electronics Group of the 56-year old Electronic Industries Association (EIA/CEG) which has its headquarters here in Washington. With me is our long-time Special Counsel, J. Edward Day, a partner in the law firm of Squire, Sanders & Dempsey.

We are the trade association for manufacturers, and sellers at the manufacturer's level, of consumer electronic products including television receivers, radios, tape recorders, audio systems, phonographs, video casette recorders (VCRs) and other consumer products. Video cassette recorders are the same basic product as video tape recorders. Electronic Industries Association represents a broad spectrum of electronic products, but the division which I head, Consumer Electronics Group, represents the consumer products. Our membership consists not only of all the major domestic manufacturers but of most of the leading foreign-controlled manufacturers which have manufacturing facilities in the United States.

We include in our membership the following companies which sell VCRs at the manufacturer's level:

General Electric Company
Matsushita Electric Corporation of America
  (Panasonic and Quasar)
N.A.P. Consumer Electronic Corporation
  (Magnavox, Philco and Sylvania)
RCA Corporation, Consumer Electronics
  Division
Sansui Electronics Corporation
Sanyo Manufacturing Corporation
Sony Corporation of America
Toshiba America, Inc.
US JVC Corporation
Zenith Radio Corporation

These member companies account for well over 95 percent of sales of VCRs at the manufacturer's level in the United States.

Purpose of Our Testimony

Our purpose here today is to urge that VCR recordings of copyrighted materials off the air, when intended only for private, noncommercial use, do not constitute copyright infringement. This would confirm that VCRs are entitled to the same treatment which has been accorded, with congressional approval, to home recordings of copyrighted sound-only audio materials.

We seek to have Congress overturn the potentially disastrous effect of the October 19, 1981 decision of the U.S. Court of Appeals for the Ninth Circuit in the case of Universal City Studios, Inc. v. Sony Corporation of America ("Sony case"). That decision reversed the painstaking and thoughtful opinion of the U.S. District Court in Los Angeles. This Sony case has already been in the courts for five years, and further court proceedings are under way.

If there is no reversal of the decision by a rehearing either by the Ninth Circuit or the Supreme Court, the case will go back to the district court to determine a remedy since the Ninth Circuit left consideration of the remedy to the district court. There would no doubt be an appeal from that decision on the remedy. We seek legislative relief to avoid the possibility of a long period of uncertainty and confusion while this matter inches its way through the judicial process.

Some Facts About VCRs and Their Use

There are now almost three million American homes using VCRs, and that number is growing rapidly. That means about 10 million people have access to VCRs in their homes. In 1978, total VCR sales to dealers amounted to 401,930. In the first three quarters of 1981 alone, that figure had jumped to 883,729 units. If sales continue at the same rate during the final quarter of this year, total sales to dealers during 1981 will represent nearly a 200 percent increase over the 1978 figure. The monetary value of the American public's investment in VCRs and related products exceeds $3 billion. In spite of the rapid growth that currently characterizes the industry, few VCR manufacturers have managed to profit from the sales boom because of the enormous initial investments required and the highly competitive nature of the market. The industry is, thus, in one of its most fragile stages of development.

Time-Shifting

Home video taping occurs primarily for time-shifting purposes. Time-shifting means that if a VCR user is going to be out at a PTA meeting when a television program he wants to see is going to be on the air, he can set a time dial much like an oven timer, and the program will be recorded so that he can view it at a convenient time. Surveys indicate that 70 to 90 percent of all VCR owners make use of their VCRs primarily to view television programs that they could not otherwise have watched.

Time-shifting increases broadcast audience size by allowing those unable to view a program to view it later. A report commissioned by the Federal Communications Commission to assess the effects on broadcasters of home video recording recognizes the benefits copyright owners reap from time-shifting:

> Because both major rating services -- A.C. Nielsen and Arbitron -- now include an indication of VCR use, this time-shift phenomenon should actually be an asset to the networks and broadcasters. Shows which would have been missed can now be recorded for later viewing. Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports.

Federal Communications Commission - Network Inquiry Special Staff Appendix "Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players" (1980) p. 61.

Any fair analysis of VCR usage leads to an inevitable conclusion: time-shifting, the principal use of VCRs, economically benefits rather than injures copyright holders.

VCRs are the most popular product in our industry today.

Our trade association runs two big trade shows a year. VCRs as consumer products have been displayed and discussed at these trade shows for 10 years. Video tape recorders were first used in this country as a home product as long ago as 1965.

There is no proof that any copyright holder is being damaged by this private copying. The Ninth Circuit left that issue of remedy and damage up in the air and left the whole problem in an incredible state of confusion and uncertainty. It could take years to finally resolve the issue in the courts assuming the Supreme Court agrees to hear the case. There is no certainty the Supreme Court will even agree to grant an appeal.

We believe the Ninth Circuit decision violates the public interest by threatening to prohibit American consumers from utilizing and enjoying a product which significantly improves the quality of their lives. The VCR has numerous uses of educational, entertainment and informational value.

We are not attempting to appeal the Ninth Circut decision to this Committee. But we do feel that certain far-reaching public policy issues, such as this one, should be resolved by Congress and not by the courts. Too many recent federal court decisions have taken liberties with the private lives of citizens. Legislation is the only way to bring about a prompt restoration of common sense on this issue.

In some instances, such as the recent one on interest paying checking accounts, courts have specifically recognized that the problem was one which should be handled by Congress and have delayed the effective date of their decisions to await congressional consideration. That is what should have been done here.

The Economics of the Motion Picture Industry

We favor any company or industry making all the money it can. But let me point out that the motion picture companies are already triple dippers in the economic pot. And some of them may want to become quadruple dippers at the expense of the profit-squeezed consumer electronics industry.

When a new movie is made, the producing company releases it first for showing in theatres. If the movie is a hit, the company makes a bundle. Then, as a second dip the company can release the movie, in exchange for generous payments, to a manufacturer of prerecorded video tapes. In virtually every case of regular Hollywood-type movies the manufacturer of the prerecorded tapes belongs to a motion picture company. These prerecorded tapes, of which there are already some 35,000 titles (including over 4,000 general interest, entertainment movies) sell at retail between $50 and $100.

Then the movie company has a third dip: negotiated royalty arrangements to let the movie be shown on television. It is common knowledge that some of these movies are shown on the air dozens or even hundreds of times - some, year after year - by broadcasters large and small, and by networks, all with royalties paid to the motion picture company which owns the copyright.

The royalty paid by the broadcaster is subject to negotiation; thus, the broadcaster with a large viewing audience pays more to the movie company than a broadcaster with a small audience. As already mentioned, because of the consumer convenience feature of time-shifting, recording off the air for private, noncommercial use increases the broadcaster's viewing audience. The two major rating services recognize this factor in assigning television programs ratings. VCRs have thus created the potential for increased royalties payable by broadcasters to movie companies. The licensor of copyrighted movies is financially motivated to favor tapes and discs because the royalties obtained from such agreements are higher than those derived from cable operations.

Instead of recognizing these advantages, some movie companies apparently want to take a fourth dip to in some way charge the consumer for off-the-air recording for purely private, noncommercial use. However, we are now becoming convinced that Universal-MCA, and perhaps other motion picture companies, may not really be aiming for this fourth economic dip. We think what they may actually want is to put video cassette recorders completely out of business by obtaining a court injunction against their use. An injunction is a conceivable remedy which the Los Angeles federal district court could impose if the Ninth Circuit decision stands. The Ninth Circuit left the determination of the remedy entirely to the district court. An injunction against use would be cruel and unusual punishment in this situation. This is particularly so because an injunction would apply, at the present time, to only one company selling at the manufacturer's level - Sony - since Sony is the only manufacturer that is a defendant in the Ninth Circuit case.

Even though the Ninth Circuit's decision is law only in that Circuit, an injunction might apply nationwide, not just to Sony, but to retailers and distributors and advertising agencies involved in selling Sony VCRs. Although Sony is Japanese-owned, it conducts substantial manufacturing operations, including the making of VCR tapes, here in the United States. Its VCRs are also sold under their own brand names at the manufacturer's level by other companies in the United States. The source of VCRs to these other companies would be cut off even though they were never parties to the lawsuit and never had a trial.

The original lawsuit against Sony was started in 1976 by just two motion picture companies - Universal-MCA and Disney Telecommunications. Recently Disney has issued a press release recommending that this problem be solved by Congress. Very recently a new lawsuit was started in Los Angeles against the other companies that sell VCRs at the manufacturer's level, and against their advertising agencies - 42 defendants in all. Significantly, Disney was not a plaintiff. Universal-MCA is going it alone. We believe its reason for filing the new suit was to forestall a conflict between federal circuits - so that a federal district court in Los Angeles could, in effect, control the entire United States as far as VCRs are concerned.

Violation of Right of Privacy

Not only does the Ninth Circuit decision threaten the viability of a growing industry; its ruling has had the sudden effect of turning law abiding citizens in almost three million American homes into law breakers. The Ninth Circuit decision threatens the privacy of millions of Americans.

In a piece entitled "Smile--You're on Bootlegged Tape," the Washington Post editorial staff described the situation aptly, if humorously:

> We can see it now: the shades are drawn, the lights are low and authorities surrounding the building spot the silhouettes of four figures huddled in a semicircle on the floor .... Kick open the door and bust every one of them because, just as we suspected all along, it's another gang of little tykes in their Dr. Dentons -- watching a videotape of a Disney movie that old mums copped off prime time a week ago. That, as a federal appeals court warned this week, is breaking the law -- and never mind who's watching or where.

Washington Post, Oct. 22, 1981, at A30, col. 1.

Here again is a mammoth inconsistency. Very recently nearly all of the movie companies agreed that one of their copyrighted productions could be recorded off the air by a teacher for classroom use without any royalty being paid, although this is far from a private use. But it is a "fair use" - and thus comes under an established exception to the copyright law, because there is no commercial use or commercial gain. Consumers who video tape in their own homes for their own enjoyment should similarly come under the fair use exception.

The Economic Effects of an Injunction

There are an estimated 25,000 retail outlets selling VCRs and/or blank tapes in the United States. VCRs are the most popular product in the consumer electronics industry. Each of the companies selling VCRs at the manufacturer's level has a marketing structure and merchandising staff. They have advertising agencies. In many cases there are distributors.

The havoc that an injunction would cause is inconceivable.

Summary

With this background, we give you our reasons why an explicit amendment to the Copyright Act is essential:

1. We are threatened with a nationwide injunction which would be vindictive and discriminatory.

2. If we are denied rehearing by the Ninth Circuit we will, of course, ask the Supreme Court to consider an appeal. But of the 5,000 petitions filed per year, the Supreme Court hears only 150 to 200 cases. Important as this case is we can't be sure the Supreme Court would take the case.

3. An appeal to the Supreme Court, even if accepted would not be resolved for a year or more.

4. In the meantime it is very tricky business to try to keep the case from going back to the district court in Los Angeles while the Supreme Court proceedings are going on.

5. In the meantime, in the Ninth Circuit at least, every person who is using a VCR to record copyrighted material off the air for private use is a law violator.

On this last point the motion picture company plaintiffs in the lawsuit are trying to have it both ways. They say they are not interested in pursuing the individuals who are doing the recording with VCRs. But their whole case hinges on a claim that the people doing the recording for private use are law breakers. This is because the whole exposure of the manufacturers and retailers to a possible injunction depends entirely on a "contributory infringement" theory; and if there is no violation by the private tapers there can be no contributory violation. What it boils down to is that Universal and Disney don't care if, under their theory, millions of private tapers are breaking the law. They are only interested in "getting" and destroying the VCR manufacturing and merchandising industries.

This is not just a battle between two big industries - one, the movie companies, thriving from their triple dipping, and the other, the television manufacturing industry, threatened with loss of their most popular product. It is a consumer issue. The copyright laws, like all laws, are supposed to benefit the public at large.

The VCR user is not taping for commercial use. He is merely using a convenience that developing technology has made possible as a by-product of television broadcasting. The copyright laws should face up to and adjust to the vast strides in technological advancement which have made time-shifting possible. The copyright laws should not be used for greedy purposes to hold back inventiveness and technological creativity.

We urge enactment of legislation to exempt from the copyright laws off-the-air VCR recordings for private, noncommercial use of copyrighted material broadcast for television viewing.

Senator **DeConcini**. Our next panel will consist of Sidney Sheinberg, president and chief operating officer of Universal and Mr. W. G. Williams, former president and current board member of the Independent Media Producer's Association. And there is a third person here, Mr. Hadl.

Gentlemen, would you please come forward? Would you each identify yourselves and proceed? Your statements will be printed in the record. You may summarize them for us.

I notice we are going to have a vote, so we have about 7 minutes here, and then we will take a 10-minute recess and come back to listen to the balance of your testimony.

STATEMENT OF SIDNEY SHEINBERG, PRESIDENT AND CHIEF OPERATING OFFICER, MCA, INC.; ACCOMPANIED BY ROBERT HADL

Mr. **Sheinberg**. My name is Sid Sheinberg. I am the president and chief operating officer of MCA, Inc., the parent company of Universal City Studios, one of the plaintiffs in the *Betamax* case.

I might point out before turning to my observations that with respect to some of the questions asked by the Chair earlier, the *Sony-Betamax* case as it relates to Sony and their acts prior to any action that might be taken by Congress, will continue in the courts. So at least in our judgment there is present and existing jeopardy which the present Congress cannot do much about, if our interpretation of the law is correct.

Mr. Chairman, I am appearing today to vigorously oppose the adoption, in its present form, of S. 1758, a bill which would amend the Copyright Act to provide a statutory exemption for home video recording.

At the outset, we are not here discussing one or two individuals copying our films. Currently we are talking about approximately 3 million video cassette recorder owners, and in the future tens of millions. When all of the copies made by these millions of owners are added up, we will not have just one or two little infringements; we will have hundreds of millions of copies made on a mass scale.

This very committee recognized very recently that such mass proliferations of small individual infringements cannot be tolerated under our copyright scheme when it stated in connection with the passage of our current Copyright Act, "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." This is from Senate Report 94-473, page 65, of 1975.

S. 1758 should not be enacted for several important reasons.

First, S. 1758 in its present form strips from authors and creators the rights to their property without just compensation. This property, consisting of the entire output of motion pictures in this country over the past 75 years, represents the investment of billions and billions of dollars by members of the American film industry.

The current bill gives manufacturers of video recorders, all of whom are foreign, and manufacturers of videotape, almost all of whom are also foreign, a free ride on the backs of the American creative community. The foreign manufacturers of these machines would have no real market for their product without the ability to copy our films—our property, American property.

The producers of programing, like any other property owners, rely on their legal ability to control when their property—their films—will be available for viewing. Indeed, the availability of our films for viewing constitutes their only real value.

While technology is severely changing and diminishing our ability to control the uses made of our films, we cannot accept technology taking our property, benefiting from it economically, and giving us nothing in return.

Legislation mandating such a free ride is unfair, unjust, and in our view unconstitutional. I want to be very clear on the latter point, and I say so notwithstanding the learned colleague from Hofstra.

Congressional action purporting to permit copying of our presently existing copyrighted films in their entirety, without fair compensation, is a violation of the Constitution of the United States in our judgment, and we will furnish to this committee a memorandum of law supporting this contention.

Second, S. 1758 in its present form is contrary to sound public policy. The Supreme Court has recognized that the economic philosophy underpinning the copyright clause in the U.S. Constitution is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.

Such encouragement is the American economic way. S. 1758, if enacted, would grievously reduce and in some cases destroy the incentive, if not the very ability, to create and deliver the quality entertainment fare which the American public is entitled to receive.

The American film industry will be severely impaired if the Congress expropriates its property without just compensation in the name of modern technology. Moreover, hundreds of thousands of ordinary working men and women who are members of national unions and guilds are dependent upon income from this industry for their paychecks, their union pension funds, and their health and welfare benefits.

No public policy is served by legislation that so specifically takes the property of an American industry that annually contributes hundreds of millions of dollars to our balance of payments and pays taxes on its profits in favor of an industry which is controlled by foreign interests.

Third, a complete statutory exemption for home taping is no solution, given the real and adverse impact of video recording devices.

It should not be necessary for the owners of copyrighted property to prove harm or damage when their property is taken to prove a violation of law. No one asks a person whose house or car has been used without permission to demonstrate specific harm to prove that the use was unlawful. Furthermore, would anyone seriously claim that they have a right to make phone calls in the privacy of their home using the telephone company's property without paying the phone company?

Copyright owners will suffer unavoidable and serious harm by the proliferation of home taping. Copyright owners are not now and will not in the future be compensated by network or station licensing revenues based on purported additional time-shift viewers because time-shift viewing is not measurable.

It is not true that A. C. Nielsen and Arbitron are prepared to report time-shift viewing. Even if a system of measuring such time-shift viewing were to become feasible, a study of video recorder owners indicates that 84 percent skip commercials. The study to which I refer is "Video Recorder Households, What They Say, What They Do," by Media Statistics, Inc., Spring, 1980. What advertiser or broadcaster is likely to pay for time-shift viewership when it is either unmeasurable or such viewership is without commercials?

Moreover, every time-shift viewer of our property is less likely to be a potential or actual viewer for subsequent broadcasts of such films. Subsequent viewership is essential to the economic viability of the television production business, as we know it today in the United States.

Additionally and obviously, the time-shift viewing of a recorded program diminishes the audience for programs then currently being broadcast, resulting in a reduction of advertiser revenues and ultimately compensation to the copyright owners of such programs.

In a well financed and deceptive campaign, the Sony Corp. and others imply that consumers are only time shifting programs, not retaining them in permanent video libraries for multiple viewings by their families, friends, and neighbors.

However, the evidence is overwhelming that the number of blank video cassettes being purchased per video recorder household, estimated to be an average of $18.35 per video recorder household, is far in excess of the number required for time shifting alone.

Apart from the foregoing instances of harm, copyright owners will be adversely affected in their attempts to sell or rent prerecorded materials. If more and more video recorder owners, instead of buying or renting prerecorded cassettes or discs, are able to obtain copies by recording from their television sets at the cost of a blank tape, the sales and rental potential of prerecorded video cassettes or discs will be severely eroded. Can it be seriously argued that MGM's sale or rental of prerecorded video cassettes of "Gone With The Wind" are not harmed by home video recording?

Let me assure the committee that Universal City Studios, Inc., would not have expended several million dollars of its own funds in prosecuting the *Betamax* case to date if it did not believe that the potential damage and injury to its property were severe.

Fourth, legislative solutions may be available that would both allow the public to have access to copyrighted works and to secure to program producers, authors, and other creative talent compensation according to use and enjoyment.

Indeed, while President of the Sony Corp. of America Mr. Harvey Schein recognized the propriety and fairness of creating a pool of funds from which copyright owners injured by the video recorder technology could be compensated. Mr. Schein did so, separate and apart from any position that he may have held with respect to the legality of off-the-air taping.

Legislative solutions require careful study and informed discussion. They do not include invading homes or seizing machines. We have no such intentions.

The Register of Copyrights, a disinterested observer, recently delivered a thoughtful address concerning the subject matter of S. 1758 which has been introduced into the Congressional Record by Congressman Tom Railsback. I would request that Mr. Ladd's remarks be made a part of the record of today's proceedings.

Senator DECONCINI. Excuse me, Mr. Scheinberg. I would be glad to make that a part of the record. I am going to have to depart for about 5 minutes. Senator D'Amato is on his way back. As soon as he returns, he is authorized to continue the chairing of the hearings, and you may continue if you like. If you would stay right there, he should be back momentarily.

[Recess taken.]

Senator D'AMATO [acting chairman]. Let us come to order.

Mr. Scheinberg I understand has a time problem, so we would like to accommodate him and continue the hearing.

Mr. Scheinberg, would you continue with your testimony?

Mr. SHEINBERG. Senator, I would just like to point out that I have missed the plane in question, so my time problem is now relieved.

Senator D'AMATO. So we have your company for a little longer, to ask you all these stinging, probing questions?

Mr. SHEINBERG. You have me as long as you would like me.

Just to continue and conclude, the Register of Copyrights, a disinterested observer, recently delivered a thoughtful address concerning the subject matter of S. 1758 which has been introduced into the Congressional Record by Congressman Tom Railsback. I would request that Mr. Ladd's remarks be made a part of the record of today's proceedings.

In his address, Mr. Ladd urged that we avoid "sensationalism" and not act in "undue haste" in approaching the profound and important copyright issues raised by video recording machines. We agree.

We ask that the committee do what is fair—that it continue to protect copyright and its constitutional purpose, that the committee respect our private property as it would its own and that of its constituents, and that it not respond to the clamor for an immediately popular solution by sacrificing fundamental values and constitutional rights.

We oppose the adoption of S. 1758 in its present form. We urge this committee to consider alternatives which would both protect the American public and provide adequate protection and compensation to American copyright owners from the foreign manufacturers of video recorders and videotapes.

It would be well to heed the comments of the Register of Copyrights:

> The public interest is paramount, to be sure. But the public is served quite as much by a respect for property—and copyright is the highest kind of property—as by expropriating it from its creators and owners for mass, free use.
>
> It is too often easy to convince people that the public interest is always served when someone else's property can be had for free.
>
> The more difficult task is to balance such impulses against the rights of our creative minority to advance public welfare through the talents of authors . . . in "Sci-

ence and Useful Arts" and to fashion an "acceptable cost (for) . . . access to published works . . ."

That requires statesmanship. And statesmanship is not possible on the fly.

I would just like to add one additional remark, if I may. I have been shown a copy of the letter from Hon. Charles Mathias, Jr., to Hon. Strom Thurmond, a letter referred to earlier, in which Senator Mathias indicates his concern for the protection of those whose creative property is recorded and indicates his intention to introduce an amendment to assure that the home recording privilege—and I am quoting—"does not unfairly abuse the rights of property owners."

Thank you.

Senator D'AMATO. I am sorry, Mr. Sheinberg, that I was not here to hear the eloquence with which you presented your testimony, and I know that you believe very passionately and strongly in your case.

It was obvious from your introductory remarks that regardless of what Congress does, you are going to continue to pursue this one avenue. Obviously you came prepared to answer the questions. When I asked the questions of the other panel, they did not have an answer there, so I am not going to give you any soft balls.

Mr. SHEINBERG. Give me all the hard ones you can.

Senator D'AMATO. One of the statements that you made—and I am going to make my own observation—is that a good deal of the parties involved are foreign-owned. I am talking about the video area of recording. Is that not a bit of sensationalism? If we look right at it, we are not talking about hurting an American industry as opposed to a foreign industry, because we are aware of the benefits that accrue to this country through increased employment, et cetera, regardless of whether we are talking about Sony or anyone else.

If you want to amplify upon that, fine, but you did make that remark, I understand, by stating that most of the parties involved in the video recording industry are foreign-owned.

Mr. SHEINBERG. All the manufacturers are.

Senator D'AMATO. All of them are?

Mr. SHEINBERG. That is my understanding.

Senator D'AMATO. Should that make a difference in what we are talking about—that all the manufacturers are foreign?

Mr. SHEINBERG. Yes, I think it should.

Senator D'AMATO. It should?

Mr. SHEINBERG. Yes.

Senator D'AMATO. Oh, my gosh. You and I will have a good time. Are you telling me that because it is a Sony or someone else that the basic rights involved here—patent rights, copyrights, individual rights, et cetera—should make a difference?

Mr. SHEINBERG. No. I misunderstood your question.

Senator D'AMATO. But your statement indicated just exactly what you said now. Maybe I misunderstood or my staff misunderstood that, because these are foreign parties involved, consequently we should look upon it with maybe a jaundiced eye, or maybe we should be tougher on them. You do not really suggest that?

Mr. SHEINBERG. The legal issue is obviously identical wherever the machines are made.

Senator D'AMATO. But a legal issue does not mean whether or not they are a foreign company or an American corporation. We are not really concerned with that, are we?

Mr. SHEINBERG. We are not concerned with that from a legal sense.

Senator D'AMATO. So maybe we should drop that part out of our presentation. Is that right? That really does not matter, does it?

Mr. SHEINBERG. The point was made relative to such things as the fact that the American motion picture industry is the industry with which we are concerned.

Senator D'AMATO. What about all the people sitting at home who have these machines? Do you really think they are infringing on somebody's rights?

Mr. SHEINBERG. Do we think they are?

Senator D'AMATO. Sure. That is what we are down here for. Let us cut right down to the bottom. Do you honestly believe that they are infringing on your rights? You obviously do.

Mr. SHEINBERG. Senator, not only do we, but the ninth circuit also does.

Senator D'AMATO. You heard the professor comment. There seems to be a little ambiguity in that law.

What is the difference between an audio recorder that I have at home and a video recorder?

Mr. SHEINBERG. There are a number of differences. No. 1, audio recordings—the very things which are being recorded—were not even the subject of copyright until relatively recently. I think I have the exact year, as a matter of fact—1971.

The very statutory provision which was included in the act permitting the recording of those sound recordings was included in the same act that invested in sound recordings copyright to begin with, whereas motion pictures, for whatever the reasons—and I think I can shed some light on that—have been the subject of copyright protection for many years longer than that.

Senator D'AMATO. Video recording? Home video?

Mr. SHEINBERG. Motion pictures have been the subject of copyright——

Senator D'AMATO. Is that what we are talking about? How is your copyright infringed upon after you have been compensated? You have received your royalty from your movie theater and from all of your other agreements. Where do you lose revenue, or how are you infringed upon as a result of my recording something that comes from my television?

Mr. SHEINBERG. I hate to go back into——

Senator D'AMATO. I want you to bottom line it. Give me the bottom line.

Mr. SHEINBERG. We lose revenue for the following reasons: No. 1, we basically are going to get paid depending upon the number of people that the rating services feel are watching our programs. That is a gross statement.

Senator D'AMATO. Sure.

Mr. SHEINBERG. Contrary to the testimony before your committee, it is our belief that there is no way at the present—and I would urge this committee to consider asking the people who run the rating services themselves—in which those usages of video cassettes can be reported.

No. 2, these machines now are extremely brilliantly conceived, so they have got fast-forward devices, and our research indicates that about 84 percent of the people who watch them later—these recorded programs—watch them without commercials.

If in fact it were true that one could record these programs, the reporting were totally accurate, and the commercials could not be deleted, our complaint, I think, would be seriously reduced. Regrettably, that is not the fact.

Senator D'AMATO. Is it not true that the Nielsen people and those of the other companies who do this actually have people keeping diaries of the programs and are quite explicit and detailed?

Mr. SHEINBERG. No.

Senator D'AMATO. It is not?

Mr. SHEINBERG. No.

Senator D'AMATO. I have been given to believe that they have people actually keeping diaries, and they do these interviews by telephone as to the programs they are watching, and that this is a matter which, with some ingenuity, could be handled.

Mr. SHEINBERG. It is my understanding, contrary to what you apparently believe and what has been testified to today—and I will repeat what I said earlier——

Senator D'AMATO. That is an important consideration.

Mr. SHEINBERG. I think it is very important.

Senator D'AMATO. In other words, if the industry could be assured that there would be some way of monitoring and rating how many people saw the program, et cetera, that might change your opinion in some manner?

Mr. SHEINBERG. Providing that the commercial message were also seen in a timely fashion intact.

Senator D'AMATO. You would want some in depth research as to the delivery of the advertisement as well?

Mr. SHEINBERG. Many advertisers want their message at a given time. You do not want the Christmas message viewed in March.

Senator D'AMATO. Understandably so.

Let me ask you something. Have you not commissioned any studies on this now?

Mr. SHEINBERG. Yes, we have.

Senator D'AMATO. All right. Second question: Have you observed any changes—any shifts, for example, in your advertising—as a result of video cassettes, as a result of revenues, as a result of viewership? What statistics or information, if any, have come to your attention that might create this concern at this time?

Mr. SHEINBERG. This concern is created, not in a static or fixed form. When we first brought this lawsuit, which is the predecessor of this hearing, there were approximately 20,000 or 30,000 video cassette recorders in the United States.

The argument was made by learned counsel, some of whom were in the room, to the effect, "Why should we complain? It is too premature to complain. There are only 20,000 or 30,000 of these things?" Now the argument is, "My God, there are already 3 million of them. What do you expect us to do about it?"

Our concern is what is going to happen to us when every American who shops in Mobile and other places owns one of these video cassette recorders. Then it is going to have a very material impact.

Senator D'Amato. Then you are going to be in the same box as the audio people are, because they have got 100 million audio machines out, and it would be impossible to do anything in that case. Is that not a practical matter?

Mr. Sheinberg. I do not represent the audio industry, but I can make the following observations: The recording off the air has significantly destroyed the record business in most countries of the world. It is in very bad shape. I do not purport to be an expert, but that is a fact. If we do not concern ourselves with this now, the problem is not going to go away; it is going to get worse.

Senator D'Amato. Mr. Scheinberg, I understand your concern.

The chairman has returned. I would just like to ask his indulgence to ask one other question. I understand your concern in terms of knowing how many advertisers we missed as a result of this TV recording. Let me suggest to you that maybe—just possibly—many, many more people may see that show and get that advertising message as a result of recordings because now, when they are out, are watching another show, are working, or whatever, they do have a way by which to receive that message that otherwise they would not.

I have no scientific data on this, but I would suggest to you that that could very easily be and should be the subject of a study. I would not be a bit surprised—I would venture to say, again from the seat of my pants—I find a lot of things are done from the seat of your pants here—I would wager that you would find many more people see that message as a result of these little home recorders than otherwise would, even when you get into these TV rating wars and they put one prime program against another.

What does a guy do? Switch back and forth? He certainly is not going to look at the commercial, I will tell you that, if he wants to catch a few minutes of one and a few minutes of another, or if he is watching a ball game. As soon as that commercial comes on, he goes over to the other. I have done that. You have done that, have you not?

Mr. Sheinberg. Yes.

Senator D'Amato. I did it the other day. They had me on every television channel. You would think they were saying good things about me. They were saying horrible things, and I was watching to see what the son of a gun on channel 2 said, then 4, and then 7. I was zipping around there. I do not have one of those recorders, so you cannot enjoin me. [Laughter.]

Mr. Sheinberg. Senator, with your indulgence I would like to ask the following question. I ask it rhetorically, because I obviously understand the purpose of these hearings is for you to ask me questions, not me to ask you questions.

If the evidence were forthcoming that indeed, No. 1, there is not a good way to report the results of videotape recording in the home——

Senator D'Amato. In terms of impact, et cetera?

Mr. Sheinberg. No, just who is watching what and, No. 2, that 84 percent of the people or some significant number like that do eliminate the commercials, then you could understand, could you not, how this would have an adverse impact on us?

Senator D'AMATO. I could understand your concern. Notice the way I hedged that answer.

Mr. SHEINBERG. There is a gentlemen here, whom I have never met before in my life, who appears to represent some nonbiased testimony, by the name of Mr. Waz of the National Citizens Committee for Broadcasting. With the exception of the fact that he sees this Senate bill as an appropriate interim measure, which he does and therefore supports it, I found myself supporting about 90 percent of what he said. He focused on not only the eagerness to somehow decriminalize—and, by the way, copyright infringement in the home is not a crime.

Senator D'AMATO. Pardon me?

Mr. SHEINBERG. Copyright infringement in the home is not a crime, so these people who have been variously painted as criminals and the like—there is no issue of their being criminals, and if we say we are not going to proceed against them, I believe we have the authority not to proceed against people who might otherwise be tort feasors of some sort.

With the exception of the point that he made, which is that he saw this bill as an appropriate interim device, I found myself subscribing to most of what he said, because he was interested in the impact upon the community that made the product, not because I believe he has any love for those of us who toil in those vineyards, but because he recognized that ultimately a diminution of their productivity is going to impact negatively on consumers.

Senator D'AMATO. Mr. Scheinberg, let me assure you that it certainly is not the intention of this Senator—and I am certain that, when I indicate my sentiments, Senator DeConcini shares them as well—to do any kind of injury to those who make possible the entertainment and the programs that those of us would like to see recorded or do record.

We do have an underlying concern. Make no mistake about it. Although I support S. 1758, whether it is pride of authorship or not, the totality of the problem is one that should not be negated as a result of what we see to be maybe an interim step. I think Senator DeConcini has indicated that a number of times. We do not say this is the final answer, we do not say this is the end-all and be-all, but really treat it in the manner of dealing with this one particular problem.

I think some of the things you have brought forth today—can we take an accurate survey? What happens if we determine, indeed, that the advertising message does not get through and there is that kind of adverse impact that ultimately will reduce the productivity and the capability of the industry to proceed?—those are questions that certainly have to be looked into, with the balancing as to whether you put out of business or allow to be put out of business another industry as well. That is a very legitimate question, and I do not think we should engage in it. That is something that we have to weigh also.

Do they face a situation of dire consequences? If we do nothing, do we not just continue to dig that hole for them when someday, if we allow it to go on—as you would seem to indicate, saying, "Well, we have a right to the product wherever and whenever, and it should not be shown again"—I think we could see some dire consequences potentially posed for their industry. So it is a balancing of those two.

With that, I turn the chair back over to Senator DeConcini who has come back.

Senator **DeConcini**. Mr. Sheinberg, did you finish your statement?

Mr. **Sheinberg**. I finished my statement.

Senator **DeConcini**. Mr. Williams, do you have a statement?

Mr. **Williams**. Yes, I do.

Senator **DeConcini**. You may proceed, please.

STATEMENT OF W. G. WILLIAMS, FORMER PRESIDENT AND CURRENT BOARD MEMBER, INDEPENDENT MEDIA PRODUCERS ASSOCIATION

Mr. **Williams**. I am W. G. Williams, and I am on the board of directors of the Independent Media Producers Association.

The members of the Independent Media Producers Association, a nationwide organization of producers of motion pictures and videotapes, have a great interest in the outcome of this debate over the future legality of the off-air videotaping of broadcast materials. To muddy the waters a bit perhaps, our primary concern is one that has not yet been brought to the attention of this committee.

Senate bill 1758, which was introduced in response to the *Universal* v. *Sony* decision with the intent of legalizing home video recording of off-air material, is, we feel, much broader than necessary to achieve the goal.

The bill gives a tremendous foot in the door to those who would make unauthorized copies of all types of video and motion picture programming, broadcast or not. In fact, the limiting words "broadcast," "home," or "television" do not even appear in the bill.

The apparent intent of the bill is definitely worthwhile—to allow American citizens the right to this technological convenience that we have been discussing—but this must be done without disallowing the copyright holders a fair return on their investment.

If the profit incentive is removed or significantly reduced for the producers, all those who enjoy film and television programs will suffer because independent producers will either turn their attentions to other endeavors or will produce materials that will be specifically excluded from any market that cannot be tightly controled.

Members of IMPA, with a few exceptions, are not the large studios or corporations that have tremendous resources to fall back upon or even tremendous numbers of copyrights. Rather, most are independent entrepreneurs or small businesses that produce programs for training and education as well as entertainment.

Often these programs are produced spontaneously in the hopes of recouping costs through future sales. Therefore, the making of any unauthorized duplicates of their programs represents a significant financial loss to our producers. Although this unauthorized duplication has been a problem for some time, the passage of S. 1758 in its present form will only exacerbate the situation.

As a result, a major concern of our organization is that the passage of this bill, as written, could be construed by the general public to be a wide opening of the door to unauthorized duplication.

The bill, as written states that it:

> * * * is not an infringement of copyright for an individual to record copyrighted works on a video recorder if the recording is made for private use and the recording is not used in a commercial nature.

Let me illustrate our concerns with this wording that I just used. Does S. 1758 mean that an individual may order a preview copy of any kind of film or videotape or obtain such a program on approval from an authorized distributor—we are not talking broadcast—make his or her own copy of that program, and return the original material to the distributor without a purchase? The wording of S. 1758 seems to give away the store.

Since broadcasting is not mentioned in the bill, it would also seem that the current wording of the bill would allow anyone to copy any copyrighted films or tapes obtained from any source and not be in violation of the Copyright Act as long as it is for private use and not used in a commercial nature. Under S. 1758 it would seem that the copyright holder would have no recourse or make very few sales.

Senator DECONCINI. Excuse me, Mr. Williams, if I understand what you are saying, would it not require a person to have two recorders?

Mr. WILLIAMS. That is true.

Senator DECONCINI. So they would have to go out to put together an operation where they wanted to borrow one.

Mr. WILLIAMS. That is very true.

Senator DECONCINI. So they would have to double their investment?

Mr. WILLIAMS. Right.

An independent producer of motion pictures or television programing would seem to have far less hope of ever making a return on his or her investment as a result of this apparent abrogation of his or her copyright.

If the wording of the bill were sufficiently narrow as to be limited to that material which could be obtained off-air from open circuit broadcasting or even cable television, where the producers have already been reimbursed for their efforts—at least theoretically—it would be different. But the wording of the bill is so loose as to endanger the copyright protection of all video material.

With the passage of S. 1758 in its present form, the holder of copyrights on video material would have little hope of ever making a return on a speculative investment and might well decide that plumbing or carpentry would be a far better way to make a living. That may well prove to be the case.

The end result could be a reduction in the amount of future programing, since there would be little chance of paying the developmental costs of any programs not having a prior guarantee of network or theatrical play. This would seem to be to the detriment of the very people that the bill is intended to benefit, and this was one of the concerns voiced by Mr. Waz. Currently this unauthorized duplication of materials is frequently referred to as piracy and, if you are a producer, the term is apt.

The Federal Bureau of Investigation has been making considerable strides recently in developing ways of determining whether specific motion picture prints and videotapes are pirated or not.

It is also IMPA's concern that the passage of this bill, as written, will make it more difficult for the FBI's antipiracy unit to continue this work. This bill might also make it more difficult to obtain piracy convictions of those few who cause a significant loss to the entire industry, including Columbia and the major studios, through their wholesale production of pirated copies of programs.

While a variety of solutions has been suggested here today, IMPA would like to make the recommendation that changing the wording of the bill could go a long way toward addressing many of our organization's concerns.

First, we feel that the wording might be:

> Notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record on a video recorder for private use in the home television signals transmitted through the air or through cable into the home provided, one, that no additional copies be made or be allowed to be made; and, two, that there be no commercial use of any recordings made under this section.

Mr. Friedman earlier today elaborated on what, home, could be referred to under terms of law. This wording would address the specific situation that inspired the bill and would allow individuals the full use of their recording equipment to enjoy television programing at their leisure in their homes. This wording also would provide a measure of protection to the copyright holders of the broadcast material. And, finally, the wording would provide additional protection to the producers of copyrighted educational materials which are rarely broadcast into the home but which are often telecast over closed circuit or ITFS systems into classrooms.

Additionally, we feel that the bill should be expanded to stipulate that it does not authorize any further distribution of any videotapes recorded under its provisions, it does not authorize reproduction of any copyrighted materials not telecast into the home, and that any such duplication without the express concern of the copyright holders constitutes a violation of copyright.

To conclude, the Independent Media Producers Association agrees that individuals should be allowed to enjoy television in their home on their own schedule. This means that off-air video recording of television programs for private home use should be completely legal.

However, in correcting the apparent oversight in the Copyright Act brought to light by the *Universal* v. *Sony* decision, the Congress should not pass legislation that would be so broad as to deny copyright protection to the producers. We feel that S. 1758, in its present form, does just that.

We respectfully urge this committee to study ways to revise the language of the bill so that the rights of the few will not be annulled in the haste to reestablish the rights of the many.

Senator DECONCINI. Thank you, Mr. Williams. I think that is a very constructive suggestion that certainly goes to the thrust that the authors of this bill intended, and that is to exempt the consumers in their home for private use from having to be subject to the Copyright Act. Your suggestions are certainly along those lines.

I wonder if Mr. Sheinberg cares to comment regarding those suggestions? How does your benevolent organization feel about that, sir?

Mr. Sheinberg. I think his suggestions in terms of what concerns him are well taken. They do not go to the heart of my concerns, but I can understand his.

Senator DeConcini. What suggestions do you have, Mr. Sheinberg, as to what ought to be done in this area? Should we leave it to the courts to make this determination?

Mr. Sheinberg. No. 1, I do not see, as I said earlier, a way out of the costly procedure that Universal and Sony find themselves in, in terms of all the acts, if they continue to be viewed as infringements that have taken place to date. I am afraid that we are going to be in the courts, absent some type of bilateral or multilateral type of settlement.

No. 2, I think there is an appropriate remedy that might be considered. Left to my own devices, it certainly would be only candid to state that we wish that the videotape recorder were not a problem that we had to confront. However, the reality is that the videotape recorder is a device that is proliferating. Consumers do like it, and we have to face that reality also.

Our main concern is that, before Congress adopt any law which in effect takes this radical approach toward eliminating such an important aspect of our copyrighted property, there really be very intense and due deliberation about what damage can occur and how do we properly compensate copyright owners for such damage.

We are concerned that there has been a rush to judgment, and we think this is a time for careful, detailed study. If the copyright owners are unable to convince you and the Congress or other appropriate tribunal that indeed their injury is real, not imagined, that is one case. We obviously believe it is real.

There is only one way that I have ever been able to figure out that you can cope with something if indeed you determine that you wish to grant what amounts to a compulsory license to people to permit this limited type of copying in the home, and that is that some type of fund is going to have to be created out of somewhere that is going to go toward compensating that mass of copyright holders that are entitled to some compensation.

Senator DeConcini. You are talking about the consumer obviously, when you say somewhere, someone.

Mr. Sheinberg. No.

Senator DeConcini. That has to be the people who are going to use it.

Mr. Sheinberg. No.

Senator DeConcini. Where else would it come from?

Mr. Sheinberg. Quite frankly, our view is that the source is the place from which this fund should come.

Senator DeConcini. You mean the manufacturers?

Mr. Sheinberg. The manufacturers of the tapes, the manufacturers of the machines. Whether or not this is something that can be absorbed in their profits I do not know. I understand for example that the duties on these machines will be reduced in the next few years.

There is a very peculiar thing here. We are told on the one hand that this is a gigantic business that is saving the entire American economy—$3 billion. On the other hand, we are told that it is in a very precarious state.

I do not know whether or not and to what extent any type of fund that is created has to be passed on to the consumer, and I also do not believe that the consumers, by and large, would find any such additional payment—even if it does get passed on—unfair. They understand what property is. I think we sometimes do not give consumers enough credit. They know that if they have a piece of property and somebody wants an easement, there is a cost for it.

What you are really talking about here, to switch idioms for a moment, is giving these people a type of easement in our property.

Senator **DeConcini**. Wait a minute, Mr. Sheinberg. A lot of easements go across my backyard that I do not get paid for. The utility line is there. I did not ask for any payment. They asked me if I would give it to them, and part of that was for the service in the neighborhood, and I gave it. I do not quite see the equation there or how this is an easement. But that is really not too important for me.

The point that you raise may be a tariff of some sort. You underscore the fact that these are foreign investments and ownership, and they ought to be placed in some other category than other American businesses. I get that from your original statement. So I conclude that maybe your suggestion is—and maybe there is some merit to it—that if these are imported, that there be a tax or tariff on that importation. Are you suggesting something along that line?

Mr. **Sheinberg**. That is a possibility. What I am basically suggesting is this. I am starting off with a premise. The premise is that we do want to protect the American motion picture industry. If we do not want to do that, I waive everything I have said, and I will go home to California. I think we ought to. It is one of the few, if not the only, viable motion picture industry in the world. It also is a great exponent of the American way of life.

If we are interested in protecting that, then the concern is how we go about doing that if there is some jeopardy. If the jeopardy that we perceive of is real, and if you start off with the premise that you want to grant a compulsory license, as it were—because that is what we are talking about. This is not a fair use as the copyright law has ever known that term. It is not analagous to the librarian who accidentally makes an extra few photocopies. This is a compulsory license.

If you want to grant a compulsory license and you recognize that the licensor, as it were, is going to be injured by this, you have got to create some fund which somehow is going to be distributed among people legitimately entitled to it.

If somebody is not injured or is not entitled to it, he would not share in the fund. To me this is very analagous in many ways to the distant signal rules and the Copyright Royalty Tribunal.

Senator **DeConcini**. I can make some argument. It seems to me you are correct, the motion picture industry is important, it does promote the American way of life. On the other hand, it seems to me that someone's noncommercial copying of a football program or a show in their home so they can see it at another time is also part of the American privacy that we all ought to have in our homes. That is why we are in this discussion.

I just find it very difficult to say, Well, the motion picture industry and those talented people who have performed so well and done well economically—most of them—should be put above the right to use it within your home when there is no profit being made. That is really what we are talking about, and it is very difficult to balance one against the other and say, You, as the motion picture industry, should be paid by the person who is sitting in his living room having a beer, watching a fight that he could not see the night before, a football game, or some motion picture that was on, paid for by the television station.

Mr. **SHEINBERG**. May I comment on that for just one moment, Senator, not to be unduly litigious?

Senator **DECONCINI**. Surely.

Mr. **SHEINBERG**. The reason I think you have a concern with that comes from a core of a failure to really emotionally—I am not speaking intellectually—emotionally understand what this property is.

Let me give you an analogy. If you had a home that you had invested a great deal of money in somewhere around Phoenix, and there was a very nice fellow, not a burglar, not a crook, who needed a place to stay for the evening, and for whatever reason you did not choose to admit him and he decided that he was going to spend the evening in your house, or to use your car, as it were, I think you would be aggrieved. I think you would turn to him and say, "Wait a minute. It is my property. I should be the guy that controls it. It is not a question of whether or not he injured my house irreparably."

Senator **DECONCINI**. But my house is not out there for public use. I am not being paid to have my house in Scottsdale sit there for people to come and use. The people you represent are making a living that way. The more that it is promulgated, the more exposure, the more money they make.

Mr. **SHEINBERG**. When we license a program to a broadcaster, we do not license that to be recorded any more than you permit your house to be used.

Senator **DECONCINI**. But you are in the business of getting people to look at your product and use your product, and they do pay for it.

Mr. **SHEINBERG**. No. Who pays for it?

Senator **DECONCINI**. The theater pays for it. The broadcaster pays for it. The commercial user pays for it.

We are only saying, "Should the person who sits in his house, who has spent the money that all of your good people have done so well on, now pay again?" I think that is what it comes down to. And I get emotional about it, because I do not want somebody in my house, but my house is not out there being promoted for use. I am not getting any revenue from the fact that I have a nice house in Paradise Valley or Scottsdale, Ariz.

On the other hand, when I sing a song, do a dance, or perform in a movie, and the only way I can get paid is for that to be shown all over the country, either on television or in the theaters, I get paid for it, and rightfully so, and, I do say, quite handsomely—at least the ones that we read about. And they should be paid whatever the market will bear. I am prepared to pay the $4, $5, or $6 to go to a movie, because that is the talent you see and that is the marketplace, and that does not trouble me.

Mr. **Sheinberg**. So your conclusion might be that for Sony or the other manufacturers, it is all right for them to have a multibillion-dollar business; it is all right for the consumer to have the privilege of seeing this in the home; and the guys who are left out in the cold, they are the people who made all the product, because somehow or other they have been paid for it once or twice? That is the whole issue here.

Senator **DeConcini**. Yes, but they have been paid for it, more than just once or twice; they are paid for it time and time again in many instances.

Mr. **Sheinberg**. If there are enough video recorders out there and my hypothesis is correct—that this recording will not be recorded and the commercials will disappear—you will quickly find that this product will disappear from free television.

Senator **DeConcini**. Let me go to another area. Do you believe that the making of a home movie on a home recorder causes any financial harm to the copyright owner?

Mr. **Sheinberg**. No.

Senator **DeConcini**. Is it true that the commissioner of the National Football Association, Basketball Association, Baseball Association, Hockey Association, as well as the executive director of the National Religious Broadcasters, our various educational communication agencies testified before the district court in the *Sony* case that they would allow the private, noncommercial video recording of their broadcasts? Are you familiar with the case?

Mr. **Sheinberg**. Am I familiar with the *Sony* case?

Senator **DeConcini**. Yes.

Mr. **Sheinberg**. Yes, I am familiar with the *Sony* case.

Senator **DeConcini**. Is the statement that I just read to you correct?

Mr. **Sheinberg**. I do not know whether that statement is entirely correct. I do know that some of these sports people felt that there really was not enough of a residual value in their product to be concerned about and therefore did not object. I do not know what their present position is.

Senator **DeConcini**. If I told you that they did testify in the district court *Sony* case that they would allow the private, noncommercial video recording of their broadcasts—that they did not object to it—would you indicate then that your industry is not unanimous by any means—the entertainment industry at least—in the area of what should be done with this problem?

Mr. **Sheinberg**. It depends what you mean by "our industry." I do not believe that our industry encompasses the live sports people.

Senator **DeConcini**. OK. That is fine. That is really what I want to establish.

Do you have any questions, Senator?

Senator **D'Amato**. I would like to make an observation, Mr. Chairman. I think Mr. Williams did this committee a great service, and I for one—and I know you have mentioned it—never intended to see that noncommercial use be interpreted to include the piracy of copyrighted movies.

I am certainly willing to review the legislation in the light of hopefully being able to make the kind of corrections that will ease your anxieties, if it can be accomplished in such a way that will preserve the private, noncommercial use of recording at home.

Mr. WILLIAMS. We would certainly appreciate that.

Senator D'AMATO. And I certainly want to tell you I appreciate your comments.

In terms of Mr. Sheinberg's statements, I do not want him to think that we are coming from such different directions that we do not appreciate his concerns.

It is easy for someone who is not there on the firing line to say, "Well, I don't see how you are possibly going to be damaged," and just wave that aside, although I do believe S. 1758, as might be amended, taking into consideration Mr. Williams' concerns, is an answer. At least it is a partial answer to the immediate problem facing us.

That in no way precludes my looking at the situation in its entirety. Indeed, I think maybe some surveys should be made or attempts to commission those studies in terms of what the long-range impact will be.

Mr. SHEINBERG. I am very pleased to hear that. As I indicated in response to somebody's question earlier, my great concern and the reason I unexpectedly flew here to visit with you is that one gets the feeling that somehow or other this is all part of a mass rush to judgment without that study. I personally will consider this trip very well taken, and I am comforted by the fact that that type of investigation which goes to the issue that has been discussed here today will be undertaken.

Senator DECONCINI. Mr. Sheinberg, we study a lot of things here, I have voted for so many studies in the short time I have been here, and I will vote for some more, and in this subject area, too.

What concerns me is that we have some 3 million consumers here who are, I think, in a spot, notwithstanding the indication that there is not going to be any enforcement on the part of the plaintiffs. Nevertheless, that could change by corporate decision sometime down the line.

I would like to bring up one thing that sticks in the back of my mind.

Was the Senator from New York finished?

Senator D'AMATO. Oh, yes, Mr. Chairman.

Senator DECONCINI. Thank you.

You mentioned the lack of any ratings or existing studies of how much use was made. Then you said that 84 percent of the people who view time-shift programs—I think 84 percent was your suggestion from whatever studies that have been made or have not been made, as one might see them—skip the commercials. This at least means that 16 percent, if not more, get an opportunity to see a commercial as well as what had been recorded that they would not see before. Does that not have some economic value to certainly the commercial distributors of your clients' products and possibly enhance your clients, even though it is only a fifth or a sixth of a loaf?

Mr. Sheinberg. Senator, that is right, but that is a little bit like the fellow who robs a guy, takes $20, gives him back $5, and says, "You ought to feel good about it. I could have kept the whole $20."

As I said earlier, we have spent in this case in excess of $2 million of MCA's funds up to this point, litigating this case. I do not believe we are nuts. I do not believe we are quadruple dipping, or whatever the phrase was that was used. We obviously think that we have got an enormous problem here. We have told our shareholders in our annual report that the loss of this case could have a material impact on us. We obviously believe it. If we thought that our business would be expanded either through commercials or in some net value, we would be the first ones supporting this particular technology.

Senator DeConcini. Why then have you not come forward with some suggestions? Although notice of these hearings only occurred about a month ago, I have been in contact with some of your representatives, at least the Motion Picture Association, hoping that you would offer some suggestions, because we are not interested in diminishing the true cultural value and entertainment value of your members. On the other hand, to sit around and wait for a study when we have as big a problem as we have before us here—I think it is that big—is a little bit difficult.

I, for one Senator, would like to see this proceed. If we have to do it on a dual-track system with a study, that is fine too, because we can change the law. But I wonder if your association and your colleagues are in fact prepared to offer some suggested legislation.

Mr. Sheinberg. We are prepared to offer them, and I understand that Senator Mathias will so do.

Senator DeConcini. So you are not prepared to offer them today?

Mr. Sheinberg. I do not think that would be the proper protocol.

Senator DeConcini. That is fine. Of course, you have the right to do what you want to, and any Senator does. But the purpose of these hearings is to see what your solution is, and you are painting a picture of this action perhaps destroying your industry. Then to sit there and say, "Well, it is the prerogative of someone else to offer amendments and alternative suggestions," certainly does not help this Senator to come to any conclusion that you sincerely want to find some resolution for the home viewer—the consumer—who is sitting there now, subject to possible enforcement of a very astronomical amount of money and imposing some very strict criteria on the use of that equipment. I am very disappointed.

Mr. Sheinberg. Senator, may I comment on one thing you said?

Senator DeConcini. You certainly may.

Mr. Sheinberg. No. 2, for the record, I am the president and the chief operating officer of MCA, Inc., and if I really tell you that we are not going to proceed against any of those 3 million people, I really think that binds our company.

No. 2, on the issue of a remedy, I have indicated to you, or in any event I intended to indicate to you, that our view is that a fund should be created from the sale of certainly the machines and also the sale of the blank tapes.

What that fund should be, how that fund should be administered, who should share in that fund, should a determination be made by the Senate as to percentages, or should that determination be remitted to an administrative-type hearing—those are the kind of questions that I do not know that I am yet prepared to give you an answer to.

Senator DeConcini. You have those type of funds now. Is that right? There are such funds for sharing of the copyright payments. Is that correct?

Mr. Sheinberg. The nearest thing, that I am aware of, that exists is in the Copyright Royalty Tribunal area, in the area of distant signals. It would seem to me that it is incumbent upon us, and we will take that point.

Senator DeConcini. Can you describe for the committee the arrangements under which a copyright motion picture is released for showing on television by local broadcasters or by the networks?

Mr. Sheinberg. A deal is made for a certain number of runs, and a fixed license fee is entered into. What happens is that, as they perceive their viewership as going down, in the future they will pay you less. It is not that we are going to get any less for things that have already been contracted for. The issue is the things that have not been contracted for, if I make myself clear.

Senator DeConcini. Are the royalty payments a separate negotiated amount, or are they based on some formula?

Mr. Sheinberg. They are negotiated at arm's length.

Senator DeConcini. Is the royalty paid each time the movie is shown on television?

Mr. Sheinberg. Generally.

Senator DeConcini. Is that royalty amount often based upon the size of the viewing audience during previous showing of the movie?

Mr. Sheinberg. No. It is typically based upon a perception as to what that audience will be. If the buyer perceives that it is diminishing, as they do for example in the case of network movies, they pay less.

Senator DeConcini. If the video recorder increased the size of the audience, given that as a premise—I cannot prove it, but let us just assume it for purposes of this question—is it not then benefiting the financial return to the copyright holder?

Mr. Sheinberg. If the video recorder increased the size of the audience and it were measured and reported, and if that included the commercials, then I think one could very intelligently argue that you should get paid at the source.

Senator DeConcini. In the case of a motion picture, is it not true that the copyright owner of a motion picture will receive a royalty payment from three different sources—one, the money that is made on showing in the theaters; two, the royalty-based sales for prerecorded tapes; and, three, the royalty-based sales for showing on television? Is that correct?

Mr. Sheinberg. It may be correct, but there are many movies that do no business, and there are many movies that are never sold to television.

Senator DeConcini. That may be correct, but there are some films that get this three-stage use. Is that right?

Mr. Sheinberg. There are, but this committee would be shocked to find out how many do not.

Senator DeConcini. How many do not? Would you like to tell us?

Mr. Sheinberg. It is a very heavy percentage these days.

Senator DeConcini. Like what?

Mr. Sheinberg. I do not know.

Senator DeConcini. Would you like to supply that to us? We would be glad to keep the record open.

Mr. Sheinberg. We will be glad to supply that to you.

[Aforementioned material was subsequently supplied for the record:]

[illegible] 100 UNIVERSAL CITY PLAZA, UNIVERSAL CITY, CALIFORNIA 91608, 213-985-4321

Executive Offices

January 5, 1982

The Honorable Dennis DeConcini
United States Senate
3230 Dirksen Senate Office Building
Washington, D.C. 20510

Re: HEARING ON S.1758, NOVEMBER 30, 1981

Dear Senator DeConcini:

On November 30, 1981, I appeared before the Senate Committee on the Judiciary to testify in opposition to S.1758, a bill which would amend the Copyright Act to provide a statutory exemption for home video recording.

During the course of the hearing, it was asserted that most motion pictures receive royalties from at least three different sources -- namely, royalties from theaters, prerecorded tape sales, and television showings — and that, somehow, this results in "triple dipping". I responded that there were many films that do not receive royalties from all of these markets, and I was asked to provide the Committee with further information in this regard. (See Transcript pps. 135-136).

I might say at the outset that I do not believe there is anything inherently wrong in a motion picture returning a portion of its investment by being licensed in different markets. The ability to license motion pictures on an exclusive basis in different markets is provided by the Copyright Law and, in my view, guaranteed by the Constitution.

I have reviewed the data for Universal City Studios, Inc. for the period January 1, 1976 through December, 1981, and can report that of the new motion pictures released to theaters in the United States during this period, approximately 70% were not licensed for sale on prerecorded tapes, and approximately 45% were not licensed for television showing. Thus, as I indicated, many of our motion pictures do not receive the three-stage royalties to which you alluded.

It is precisely because many of our pictures do not reach television and other secondary markets that it is so important to protect such secondary revenues for the pictures which do reach those markets, for those revenues support our entire production efforts, and, without them, the number and quality of all of our productions would decrease. I cannot emphasize enough the strong relationship between a healthy licensing market and the initial investment decision to produce the high quality film productions which are most likely to reach those markets.

Moreover, I also want to make it clear that motion pictures made initially for television are almost never shown in theaters, and rarely on prerecorded cassettes. Such made-for-television motion pictures do not recoup their investment from their initial telecast, and such recoupment only occurs when we are able to license them for several subsequent showings (i.e., as reruns). Our ability to license such subsequent showings is dangerously threatened by rapidly expanding VTR sales. It is for these reasons that I strongly advocate a royalty fee compensation mechanism similar to the one proposed by Senators Mathias, Baker, Byrd and Cranston on December 16, 1981.

Sincerely,

MCA INC.

SIDNEY J. SHEINBERG
President and Chief Operating Officer

SJS/mft

MCA INC. 100 UNIVERSAL CITY PLAZA, UNIVERSAL CITY, CALIFORNIA 91608, 213-985-4321

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The Honorable Dennis DeConcini
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3230 Dirksen Senate Office Building
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Re: HEARING ON S.1758, NOVEMBER 30, 1981

Dear Senator DeConcini:

On November 30, 1981, I appeared before the Senate Committee on the Judiciary to testify in opposition to S.1758, a bill which would amend the Copyright Act to provide a statutory exemption for home video recording.

During the course of my testimony, I indicated that I would furnish to the Committee a Memorandum of Law supporting the contention that it would be a violation of the Constitution of the United States for the Congress to permit copying of presently existing copyrighted films, in their entirety, without fair compensation.

Pursuant to my statement, I am pleased to submit to the Committee a Memorandum of Law prepared by Laurence H. Tribe, an eminent Professor of Constitutional Law at Harvard University. I would request that it be made a part of the record in the above matter.

Sincerely,

MCA INC.
Sidney Sheinberg
SIDNEY J. SHEINBERG
President and Chief Operating Officer

SJS/mft
Enc.: MEMORANDUM OF CONSTITUTIONAL LAW
dtd December 5, 1981.

MEMORANDUM OF CONSTITUTIONAL LAW ON COPYRIGHT COMPENSATION ISSUES RAISED BY THE PROPOSED CONGRESSIONAL REVERSAL OF THE NINTH CIRCUIT'S BETAMAX RULING

by Laurence H. Tribe*

December 5, 1981

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* Professor of Constitutional Law, Harvard University.

INTRODUCTION

A number of bills under consideration by Congress propose to create an exception to the federal copyright law that would fundamentally alter the right of movie producers to control the copying of their works.[1/] Section 106(1) of the federal copyright act now guarantees to the owner of a copyright the exclusive right to control the reproduction of the work copyrighted.[2/] Section 504 entitles copyright owners to a minimum of $250 in statutory damages against each infringement of a copyrighted work.[3/] And the Ninth Circuit Court of Appeals recently held that copyright owners may enjoin the infringement of their works by the manufacturers of video tape recorders (VTR's).[4/] Thus, under federal law as currently written and construed, copyright owners enjoy the right to control the publication and copying of their works, and to demand damages as well as desistence from those who would commercially exploit and encourage the violation of that valuable right. By allowing owners of VTR's freely to copy, and to delete commercials broadcast with, all copyrighted works when

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[1/] *E.g.*, H.R. 4783, 97th Cong., 1st Sess. (1981); H.R. 4794, 97th Cong., 1st Sess. (1981); H.R. 4868, 97th Cong., 1st Sess. (1981); S. 1758, 97th Cong., 1st Sess. (1981).

[2/] 17 U.S.C. §106(1) (1976) (revised 1976).

[3/] 17 U.S.C. app. §504(c) (1976); §101(b) (1976) (revised 1976).

[4/] *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (1981).

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they are broadcast or cablecast on television, the pending bills take from copyright owners the very essence of their property: the exclusive right to control who may copy their work and profit from its reproduction.

Yet none of the contemplated bills takes the next step -- a step this memorandum argues that the Fifth Amendment to the Constitution requires -- because none of the bills ensures compensation to the owners of existing copyrights for the valuable property that the bills take away. The Fifth Amendment provides that the federal government may not take property without due process of law -- and, if it is being taken for a public use, without just compensation.[5] This provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole, . . . "[6], and to ensure that people may create, acquire and improve property without fear that such investments will be expropriated without fair payment.[7] Thus, the Supreme Court has interpreted the just compensation requirement to apply when significant, investment-backed expectations have been either seized or substantially reduced in value by public measures.[8] The bills now pending in Congress, bills that would effectively overrule the decision of the Ninth Circuit Court of Appeals in *Universal City Studios, Inc. v. Sony Corporation*,[9] would not only alter the ground rules for *new* film undertakings -- a matter on which this memorandum expresses no view -- but would also destroy a vast portion of the property now possessed, in the form of existing copyrights, by the producers and distributors of motion pictures and television shows -- property in which the American film industry invested tens of billions of dollars, over nearly three-quarters of a century, under a set of ground rules that Congress is being urged to modify even as applied to *existing* films and film contracts.

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[5] U.S. Constitution, Amendment V.

[6] *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See generally, F. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L.Rev. 1165 (1967).

[7] *Id*. at 1214-18.

I. PUBLIC POWER AND PRIVATE USES

It is worth observing at the outset that, for two reasons, Congress may be forbidden to take such copyright owners' existing property *even if Congress is willing to pay for doing so*. First, the takings clause is a limitation on the power of Congress, not an independent grant of authority to take anything for which it pays. Even if Congress is willing to pay for the property it takes, the taking must be independently justified under some other constitutional grant of power. Second, regardless of the asserted source of Congress' authority, the takings clause permits government to take property only when the taking serves a public purpose. The Constitution nowhere sanctions the use of the legislature's power to take property for merely private purposes.[10] Indeed, one of the reasons the takings clause requires the public to pay for what it takes is to help ensure that what is paid for benefits the public,[11] since the public will soon tire of paying for purely private acquisitions that do not benefit the commonweal. The copyright-repealing bills before the Congress, as applied to copyrights already in existence at the time such bills take effect, appear to satisfy neither of these two indispensible prerequisites.

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[8] *See* *Kaiser Aetna v. United States*, 444 U.S. 163 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[9] 659 F.2d 963 (1981).

The retroactive repeal of existing copyright protection cannot be sustained as an exercise of the independent power of Congress to create copyrights, because it does the very opposite.[12] And, as will be shown below, the First Amendment does not require or empower Congress to revoke these copyrights, and in fact may forbid it to do so.

The proposed bills are also open to the serious charge that they take the property of copyrightholders for purely private reasons, precisely the sort of "robbery" that the takings clause is designed to prevent.[13] This much is indeed explicit in their very language, which allows VTR owners freely to copy once-protected materials for "private use."[14] Once the copies are sold or traded for value -- that is, when they benefit someone other than the primary copyright infringer -- the law no longer exempts them.[15] Furthermore, it can hardly be contended that the persons who will be aided by the proposed bills are the public at large. Only relatively well-to-do television owners can now afford Betamax,[16] and the claim that Congress intends to aid all those who will *eventually* own such costly equipment is suspect because Congress will be passing the measure when only the wealthier strata of the population possess these machines -- machines whose very use will likely reduce the amount of quality television programming available, to the detriment of *all* television viewers.[17]

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[10] See Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896) (compensation cannot cure the unconstitutionality of a taking for a private purpose); accord, Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) (Brandeis, J.).

[11] L. Tribe, American Constitutional Law, §§8-5, 9-2 (1978).

[12] United States Constitution, Article I, §8.

The special benefits that these bills would bestow on such foreign corporations as Sony also make suspect the claim they they are designed to aid the American public. While special aid to distressed domestic firms and their employees is permitted -- as in the case of Chrysler or Lockheed, where the entire American public might suffer if the imperilled giant fell -- Sony is in no financial distress and is, of course, not even a domestically-based corporation. Takings for purely private purposes, it must be stressed, are constitutionally forbidden even where compensation is provided. And, although the courts characteristically defer to the judgment of the legislature as to the existence of public purposes for its regulatory actions in economic matters,[18] such deference is not total[19] and readily turns to distrust where, as here, the public has not been willing to pay for what some few private parties have been given.[20] *By compensating copyrightholders for their property, in short, Congress would better ensure that the proposed exception to the copyright laws will not be found unconstitutional as a private taking*. Indeed, the fact that Congress provides compensation to those from whom it takes property may be its *only* proof in such a case as this that the exception serves a public purpose within the ken of Congress' power.

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[13] *See Webb's Fabulous Pharmacies v. Beckwith*, 101 S.Ct. 446, 452 (1980) ("[A] State, by ipse dixit, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Takings Clause of the Fifth Amendment was designed to prevent.") (unanimous decision).

[14] *See* bills cited in note 1, *supra*.

[15] *Id.* The bills cited in note 1, *supra*, protect only non-commercial recording.

[16] The average unit costs between $650 and $1300.

[17] See p. 14, *infra*.

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[18] *Berman v. Parker*, 348 U.S. 26, 32 (1954).

[19] *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 438 U.S. 234 (1978); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 529, 533 (1973).

[20] *Cf. United States Trust Co. of New York v. New Jersey*, 97 S.Ct. 1505, 1520 (1977) (judicial oversight must be tightened when "self-interest is at stake").

It should be added that, if Congress adopts a royalty scheme where copyright owners are paid some appropriate fraction of the value of each VTR or blank tape sold to consumers, the odds that one of these bills could withstand constitutional attack are also enhanced -- because such a scheme burdens those who actually profit from the infringement of the copyright rather than burdening the public at large. Such a plan would also avoid the need to increase taxes or cut other programs in order to pay for the property Congress has chosen to bestow on a small segment of the public in a period of tight budgets and broad national sacrifice.

II. PRIVATE PROPERTY, SEEN AND UNSEEN

Whether or not these two high hurdles could be overcome, those unfamiliar with the legal use of the term "property" may argue that a copyright, whatever sort of animal it may be, is not "property" at all, and that Congress thus cannot be required to pay for having taken one -- or, for that matter, compelled to adduce a public purpose for such a taking. After all, you can't plant corn or put up a house on a copyright; copyrights make unusual Christmas presents. But these doubts begin to fade with a moment's reflection, and they evaporate altogether with a minute's research. There can be no mistaking that a copyright is property in the strictest legal sense.[21/]

[21/] See J. Cribbet, Principles of the Law of Property 4 (1962); T. Fields Jr., Intellectual and Industrial Property in a Nutshell, 77 W.Va.L.Rev. 525 (1977); 21 Santa Clara L.Rev. 49, 52 (1981); 8 N.Y.U. Rev.L. & Soc. Change 45, 47 (1978-79).

With a copyright comes "the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it."[22] Property rights in intangibles have been recognized at common law since the sixteenth century; rights specifically in copyright have been enforced since early in the seventeenth century.[23] And in 1912 Congress extended the protection of federal copyright law to the new motion picture industry because "the money invested therein is so great and the property rights so valuable. . . ."[24] The fact that copyrights are incorporeal does not deprive them of their nature as species of property. They are, of course, man-made and are therefore different from land, but all manner of protectable property -- including automobiles and, indeed, the Betamax itself -- are likewise manufactured. The case of copyrights and patents reminds us that "property" refers to a legal relationship, not an object.[25] And copyrights are every bit as real -- as freighted with operative consequences, both legal and economic -- as are their corporeal and visible counterparts.

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[22] Black's Law Dictionary 1382 (rev. 4th ed. 1968). See Fox Film Corp. v. Doyal, 286 U.S. 123 (1932).

[23] Copinger and Skone James on Copyright, 1-12 (11th ed., 1971).

[24] H.R. Rep. No. 756, 62nd Cong., 2nd Sess., p.1

[25] Restatement of Property ch. I, Introductory Note (1936).

If existing copyrights are either confiscated or rendered substantially less valuable by a sudden change in law, their owners must therefore be compensated.[26] Courts routinely find that an owner's property has been substantially diminished in value, and thus "taken" in the constitutional sense, when it has been physically occupied or consumed by government; physical invasion is a reliable proxy for such substantial, and readily discernible, diminution in value. And if the government had to compensate the owners of property only when it had physically seized or occupied it, it is no doubt true that the administrative costs of identifying and compensating all relevant claimants would be low indeed. But even though all physical invasions may be takings, not all takings are caused by physical invasions. Attempts to define "takings" of property by reference exclusively to the invasion of physical space have proven impossibly ambiguous,[27] in addition to being too narrow to serve the ends of the takings clause. For the value even of physical property may be dramatically diminished without laying a hand on it, as where a zoning law renders formerly valuable property suddenly worthless. And many types of incorporeal property -- such as contracts, patents, and even future interests in land -- would be left unacceptably vulnerable by a takings rule that covered only tangible seizures and literal confiscations.

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[26] See Michelman, supra note 6, at 1184 n.37.

[27] Id. at 1186-87.

The most basic defining element of "property" -- the right to exclude others from its use without the owner's permission[28/] -- is perhaps even more essential to a copyright than it is to most other forms of property; for this right is, in essence, the only source of a copyright's economic value. Unlike bricks of gold or acres of land, which may remain valuable even after they have been seized or trespassed upon,[29/] a copyright's value is truly lost once the right to exclude others from its unlicensed and unpaid-for enjoyment and exploitation has been eliminated. This is so both because infringers are then free to make copies for themselves (something they cannot do with gold or land), and because the interest of viewers in seeing audiovisual works is limited to at most a few showings, while there is truth in the maxim that gold and land, like diamonds, are a joy forever.

Because the legal prerogative to control a film's availability for viewing and copying is thus so central to the value of the underlying copyright, the primary power (and hence the principal value) protected as property by the copyright statute in this context is the legal power to exclude others from using the copyrighted property[30/] -- a power that includes

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[28/] See Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

[29/] Cf. Miller v. Schoene, 276 U.S. 272 (1928) (diseased cedar trees felled by order of state retain value as lumber).

[30/] Fox Film Corp. v. Doval, 286 U.S. 123, 127 (1932).

the right to sue for damages those who infringe the copyright,[31] as well as the right to enjoin infringing activities.[32] Each of these rights is a species of value created by the right to copy; all would be greatly debased if not wholly eliminated by the bills now before Congress; those bills would thus unmistakably work what the Constitution deems a "taking" of private property.

III. COMPENSABLE HARMS TO COPYRIGHTHOLDERS' PROPERTY

A. THE VALUE OF THE RIGHT TO EXCLUDE

More specifically, the bills take from copyright owners, first of all, the exclusive right under Section 106(1) to copy their works. The District Court in Universal v. Sony[33] conceded that VTR copying does not merely trespass on this Section 106(1) right: "Home use recording off-the-air usually involves copying the entire work."[34] No careful line-drawing is called for here, no borderline call about how much of the plaintiffs' rights would be lost if the proposed bills pass, because the entire right to copy is lost if VTR taping is permitted.

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[31] *See* note 3, *supra*.

[32] *See* note 4, *supra*.

[33] *Universal City Studios v. Sony Corp. of America*, 480 F.Supp. 429 (1979).

[34] *Id*. at 454.

Nor is there genuine doubt that the loss of this right will gravely harm copyrightholders who have relied on it. Common sense alone makes clear that viewers will not willingly pay to see movies that they can tape for free, and that advertisers will be reluctant to invest in television spots that home viewers can easily erase before actually watching the surrounding material. Detailed proof is hardly necessary to make the point, but such proof exists in abundance for those who might require it. Thus, industry experts expect that 75% of the American television market will have VTRs in the near future[35] -- and the wealthy, most sought-after, strata of the market will have VTRs sooner than the rest.[36] Furthermore, the two chief applications of these machines involve copying regular TV series and movies[37] -- the core of copyrightholders' business. If VTR owners can freely tape and replay copyrighted works from their televisions, the owners of copyrighted shows and movies suffer in two distinct ways: the value of their programs to television broadcasters and advertisers is disastrously diminished, and sales from and licenses for use with noninfringing technologies are seriously undermined. First-run ad-space in a movie or television series will be far less valuable to potential advertisers because VTR's will allow many viewers to watch programs long after they are broadcast, reducing the "live" audience for these programs. If only 30% of television owners purchase a Betamax, and if only 10% of these record a program to view it later, removing them from the live audience, three rating (percentage) points in the television market will be lost. The loss of only one or two rating points in a television market is sufficient to cause the cancellation of a network television series,[38] and these losses are even more important in local markets, where an added rating point or two may quadruple the revenue received from program licenses.[39] Significant, widespread losses are thus a virtual certainty.

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[35] VTR's Breaking and Entering the Home Market, Broadcasting, Oct. 24, 1977 at 32; Reporter's Transcript ("R.T.") in *Sony*, 1798, 1839-40, 3043.

[36] VTR's commonly range in price from $650-$1300.

[37] See Agostino, *Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players in the United States*, Preliminary Report on Prospects for Additional Networks at 69 (preliminary draft of report from FCC Network Inquiry Special Staff, February 1980).

VTR manufacturers argue that these losses might be partially offset if advertisers could tell that a large "delayed audience," now absent from the live audience, would later view affected programs. Yet there is no reliable way for advertisers to establish that this will be the case.[40] In

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[38] R.T. 1173-74.

[39] Id. at 1442-44, 1447.

[40] Just as importantly, advertisers cannot tell how many viewers will simply delete the commercials so that the playback audience will view a program that is commercially valueless to an advertiser. The available evidence suggests that at least 40% of Betamax owners will indeed delete advertisements. Appellant's Opening Brief at 7, 80-81 (survey data). Even if commercials were not deleted on playback, much of their value would be lost. Many ads are time-targeted, and may even be counterproductive when viewed at other times. For example, Natural

(footnote continued on following page)

fact, the Betamax threatens to turn the television market on its head: the most valuable shows, often the most difficult and expensive to produce, are precisely those that viewers will record for themselves and are thus also those that viewers are least likely to see "live" or to watch during a re-run since they will have their own bootleg copy. The value of a program to an audience will then become inversely proportional to its value to advertisers and producers, and the Betamax will have penalized high-quality programming. Re-run ad space will also be of far less value once VTR's penetrate a significant fraction of the market. Television viewers, unlike record listeners, soon grow tired of repeated performances of the same show,[41] and their own average two-time replay of recorded programs[42] will exhaust their interest in it. Much of the VTR playback audience, usually one to ten persons in addition to the person who makes the recording, will also be removed

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40/ (footnote continued from preceding page)
Lite Beer's pre-Thanksgiving television advertisements stress that it is less filling than regular beer, leaving more room for food. That point may be well taken before Thanksgiving, but it would be entirely the wrong thing to stress shortly afterwards, when dieters must fast rather than feast, and when Natural Lite might prefer to emphasize that it has fewer calories than regular beer. Programs may also lose their "lead-out" or "coattail" value -- that is, their ability to bring viewers of primary programs into surrounding time slots -- if the primary program is viewed later. R.T. 1455-57.

[41] See Holland, The Audiovisual Package: Handle with Care, 22 Bull. Copyright Soc'y 104, 131 (1974).

[42] R.T. 2389-92 (40% of Betamax owners view tapes twice before erasure).

from the rerun audience.[43] Yet rerun audiences and revenues are, in the majority of cases, essential if a program is even to recoup its production costs.[44]

VTR technology will also undercut copyrightholders' markets for the sale of noninfringing technologies such as prerecorded videotapes, for videodiscs, for movie rentals, and for direct movie attendance. These losses are potentially staggering. Just three years ago, when the VTR industry was in its infancy, 31.4% of Betamax owners who used to buy or rent motion pictures were doing so less often, and 10% were already going to movies less often.[45] If TV set owners bought videodisc players rather than VTR's, sales of videodisc hardware could reach $8.8 billion within ten years; software sales alone could reach $1.8 billion each year.[46] But these technologies obviously have little chance to compete with a format where the programming can be skimmed free of charge from the airwaves, as though it simply fell from the heavens. That has been the attitude of record and movie "pirates", collectors of unauthorized recordings and prints, from the start. It is estimated that such conventional film piracy costs the film industry $1 billion annually,[47/] a cost which VTR's will make seem petty by comparison.

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[43] R.T. 1183-86 (over 60% of all Betamax playbacks are viewed by 1 to 10 persons in addition to the person who makes the recording).

[44] *Copyright Law Revision: Hearings on S.1006 Before the Subcommittee on Patents, Trademarks, Copyrights, Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 171 (1966); M. Franklin, Cases and Materials on Mass Media Law 595 (1977) (greatest television profits from licensing of resale rights).

[45] Appellants' Ninth Circuit Opening Brief at 70 (survey data).

[46] Visiondisc Corporation, Second Annual International Vision Disc Programming Conference, Report 9 (Nov. 16-18) (conference held in New York City).

B. THE VALUE OF THE RIGHT TO SUE

Second, the proposed bills would eliminate copyrightholders' power to sue the manufacturers of VTR's as contributory infringers. Not only is this an independent value created by the copyright, but it serves as a measure of the market value of the copyrighted works themselves. Congress recognized, in both the old and the new copyright acts, that the damages caused to a plaintiff's market in a copyright would often be speculative.[48/] This is especially the case where, as with the VTR, a new technology has not yet reached a significant portion of its projected market.[49/] Consequently, Congress has provided a statutory damage remedy: each copyright infringement entitles the plaintiff to a minimum of at least $250 and a maximum of $10,000.[50/] If courts were to award copyrightholders $250 for each program illegally copied by each VTR user, the recoverable damages would be in the hundreds of billions of dollars. As another possible approach to damages, if each sale

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[47/] N.Y. Times, Jan. 18, 1975, at 36, col. 1.

[48/] 21 Santa Clara L.Rev. 49, 74 (1981).

[49/] See testimony of Jack Wayman on S.1758, Senate Judiciary Committee, Nov. 30, 1981 (of roughly 80 million homes, 3 million have VTRs).

[50/] See note 3, supra.

of a VTR were treated as a separate act of infringement, then copyrightholders could, depending upon the number of units sold each year,[51] recover a substantial sum. Alternatively, copyrightholders could sue the manufacturers for the percentage of their profits derived from infringing uses of their machines.[52] As the Ninth Circuit in Universal v. Sony recognized, virtually all recordings are of materials protected by copyright.[53] If the profits of VTR manufacturers are roughly dependent on the uses to which their products are put, then the vast majority of these profits would have to be returned to copyrightholders. That is, however, the most generous interpretation: few, if any, consumers would buy the machine if they could not tape the copyrighted material they now record, and VTR manufacturers' profits would then be entirely dependent on the infringing uses of their machines. The value to copyrightholders who sued for these ill-gotten profits would also be sizeable. And the proposed congressional abolition of their claims would be total.

C. THE VALUE OF THE RIGHT TO ENJOIN

Finally, there is the separate and distinct value to copyrightholders of the power to enjoin infringing uses. That is the claim that was brought successfully to the Ninth Circuit Court of Appeals. Under the Ninth Circuit's holding, if the defendants wish the plaintiffs to forego their injunctive rights, the defendants may propose to compensate the plaintiffs for such forebearance. Of course, the plaintiffs' right to reject such an offer under the Ninth Circuit's holding is of great economic value. Indeed, the Appeals Court suggested that a just measure of that value to the plaintiffs might be a royalty on the sale of VTR's and blank tapes.[54] Such royalties could then be distributed to various claimants *pro rata* from the pool of total royalties collected. That is the solution recently adopted in West Germany;[55] it is the solution advocated by a welter of scholarly authorities;[56] it is the solution adopted by Congress to compensate copyright owners whose programs are received and cablecast by community antennae television;[57] and it is the solution advocated in Congress by the affected copyrightholders. This solution also suggests the value of the rights possessed by those whose interests would be simply and literally taken by bills which propose to legalize VTR copying even of materials covered by existing copyrights. If VTR's are purchased by two-thirds of American households with televisions,[58] an appropriate levy on VTR hardware and blank tape software, whose amount could be administratively determined at a later point, would obviously yield a significant royalty whose burdens would be spread widely and fairly over the relevant class of beneficiaries.

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[51] See Broadcasting, Oct. 24, 1977, supra note 35.

[52] 17 U.S.C. App. §504(b) (1976); see Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 398-405 (1940) (infringer liable for portion of profits attributable to the infringement).

[53] 659 F.2d at 975.

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[54] *Id*. at 976 & n.18.

[55] Law of Sept. 9, 1975, art. 53(5), BGBI 1273 (W.Ger.).

[56] *See* Arieff, *Home Taping Will Be Tribunal's First Battle*, Record World, Dec. 17, 1977, at 18; Traiman, *EIA/CEG & Suppliers Eyeing Home Video "Copyright Levy,"* Billboard, April 23, 1977, at 53, 55.

[57] 17 U.S.C. §§111(c), (d) (1976).

D. COSTS OF ADMINISTRATION AND BENEFITS OF TAKINGS

This effect -- that the value of distinct elements of copyrightholders' property rights would be greatly debased by the proposed bills -- is sufficient to constitute a constitutionally compensable taking of property. Courts have required that an owner's property be substantially diminished in value before the state is required to pay for its actions for two reasons: government could hardly function under a requirement that it identify and pay for literally every adverse effect of its actions;[59] and a substantial loss in the value of an individual's property is strong proof that the claimant has suffered the sort of focused injury that is not likely to be offset by the more general advantages of allowing such governmental conduct to go on without compensation.[60] Even if we forget for a minute that the proposed bills would cause losses to the owners of copyrights that are far beyond merely "substantial," it should be plain that neither of these two mitigating factors is presented by the bills pending before Congress. The success of the Copyright Royalty Tribunal in compensating the owners of copyrights to sound recordings establishes that the administrative machinery needed to process the claims of audiovisual copyright owners would be neither complicated nor expensive.[61] In fact, that cost is almost nonexistent because the Tribunal could simply add the compensation of this further group to its existing duties, and Congress would be spared the start-up costs of a new bureaucracy.

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[58] See note 35, supra.

[59] See Michelman, note 6, supra, at 1192-96.

[60] Id. at 1217.

Furthermore, copyrightholders harmed by the proposed bills are not like those property owners whom the courts have held unentitled to compensation because they have received other, indirect benefits from the rule in question. For example, in United States v. Sponenbarger,[62] the government was not required to compensate a property owner for flood damage to a portion of his property caused by a government flood control program which substantially reduced flooding on other portions of his land. Nor need the police pay a homeowner whose door they knock down to get at a burglar inside.

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[61] See generally, 3 Nimmer on Copyright, §14.11 (1981 ed.) at 14-13 - 14-75.

[62] 303 U.S. 256 (1939).

No such offsetting compensation exists here. In addition, if the benefits alleged to redound to the owners of copyrights are benefits that they enjoy as members of the general public, and if these benefits are high enough to warrant incurring the substantial losses caused, then the benefits conferred on the public must be more than sufficient to cover the losses at issue, and it is a mystery why the public should be unwilling to pay for them. Such unwillingness to pay thus further fuels the suspicion that only a small group will actually benefit from the proposed bills.

Moreover, even if some benefits are given to copyright owners in the form of increased first-run audience size, as Sony contends, and even if that effect could be measured with sufficient reliability to be of benefit to copyrightholders in their bargaining with advertisers, VTR manufacturers should not thereby be excused from paying for the other damage they do to the value of copyright property. However the cablecast of local signals to distant areas may increase the size of the advertising audience enjoyed by those programs, Congress rightly understood that local advertisers have little to gain by having their messages sent to inaccessible markets. Its compulsory licensing scheme for cable transmissions exempts all local transmissions and all distant transmissions of network broadcasts precisely because the relevant market is better penetrated by these signals.[63/] Similarly, courts and Congress

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[63/] See 17 U.S.C. App. §111(d)(2)(B)(i)(1976).

must distinguish between "time-delay" uses of VTR's, which may increase audience size, and permanent copying uses, which obviously contract it.[64] The Supreme Court drew a similar distinction in Zacchini v. Scripps Howard Broadcasting Corp.: "It is possible . . . that respondent's news broadcast increased the value of plaintiff's performance by stimulating the public's interest in seeing the act live. . . . But petitioner has alleged that the broadcast injured him . . . and . . . the State should be allowed to authorize compensation of this injury if proved."[65]

E. OVERVIEW: SHUTTING DOWN A NUISANCE -- OR TRANSFERRING VALUED RIGHTS?

In sum, regulatory changes bearing on a property interest's use that substantially undercut a separately identifiable component of the property's economic worth without corresponding reciprocal gain to the owner -- changes such as those proposed here -- clearly constitute compensable takings. Understanding of this principle and of its application in this context may be deepened by observing that departures from the principle, absent grave emergency, have been countenanced only where the disputed use of the property (in this case, the copyright) — the conduct whose regulation diminishes the property's value -- is properly deemed, in context, to be a public nuisance, or at least an offense to some paramount norm of acceptable public behavior. In contrast, whenever a distinctive element of the bundle of rights and powers defining a private property interest is treated by a challenged regulation not as a *nuisance* but as a *gold mine* -- not as a source of *harm to others* to be *halted* but as a source of *benefit for others* to be *harnessed* -- long-settled constitutional doctrine leaves no escape from the conclusion that the regulation must be deemed a "taking" and that "just compensation" -- a fair measure of the value lost to the owner -- must be provided if the taking is for *public* benefit, and the taking set aside altogether if it is for *private* benefit.

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[64] See Note, The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 Stan. L.Rev. 243, 245-46 n.15 (1979). But see note 40, supra.

[65] 433 U.S. 562, 575 n.12 (1977).

If a film were to transgress constitutionally valid limits on what may be distributed to the public -- because the film meets appliable criteria of hard-core obscenity, perhaps, or because it contains properly classified nuclear weapons design information -- then regulatory action to halt the film's further commercial exploitation might be defended as a non-taking, giving rise to no public duty to compensate investors' losses. But regulatory action to compel the owner of a copyright in a lawful film to admit viewers and copiers *free of charge* whenever they have purchased a costly piece of equipment from a third party -- say, the Sony Corporation -- plainly stands at the opposite pole, virtually *defining* the "taking" end of the "regulation-to-taking" spectrum.

The difference is as elementary and axiomatic as that between an Act of Congress forbidding further manufacture and sale of burglar's tools -- arguably a non-taking even as against the investor in the production of such tools -- and an Act of Congress suddenly legalizing the profitable sale and subsequent use of such burglar's tools, without payment of rent or royalty by their producer and seller, for raiding a law-abiding citizen's pre-existing inventory of valuable properties, tangible or intangible -- a taking by anybody's definition regardless of how private the setting in which, or personal and innocent the reasons for which, those tools might ultimately be turned by their buyers to this confiscatory use. (*See* Part IV-C, *infra*.)

Such congressional action is either (1) a constitutionally void taking of the inventory owner's property for the private benefit of the manufacturer and seller of the equipment that makes possible the theft that Congress has chosen to legalize; or (2) a taking of such property for public benefit, subject to a constitutional command of just compensation. On *no* defensible view of relevant constitutional principles, however, is such congressional action valid in the *absence* of fair compensation -- compensation measured by market value lost to the owner -- made available by public law either from public revenues or, perhaps more fairly, from a royalty pool collected from those who profit by the manufacture and sale of the equipment in question.

IV. END RUNS AROUND THE COPYRIGHTHOLDER'S CLAIM THAT WIND UP GOING IN CIRCLES

Against the claim that copyrightholders would be deprived of vested and valuable property rights by congressional cancellation of pre-existing copyright privilege or by congressional creation (and application to existing works) of an additional fair use exemption to the copyright laws, VTR manufacturers argue that copyrightholders never really had an exclusive right to control the copying of their productions. The arguments that lead to this view can be grouped under three headings:

(A) Copyrights were created by Congress; what Congress itself created, it may destroy.

(B) There has always been a fair use exception to the copyright laws for noncommercial, in-home recording, an exception correctly perceived by the District Court, misunderstood by the Court of Appeals, and simply set straight by the proposed bills.

(C) Copyrightholders' works were always in the "public domain" once they were broadcast on the public airwaves and into private homes; the First Amendment may require that the public have access to televised works, and it at least permits Congress to promote the public's right to listen by allowing free recording.

These three arguments are linked by a shared misunderstanding of the right to speak, to listen, and to legislate.

A. MAY THE GOVERNMENT TAKE BACK ALL THAT IT HAS HELPED CREATE?

Those who claim that Congress may eliminate copyright protection because Congress has created it have forgotten that *all property* is a creation of the state. Without enforceable trespass laws, even the central right to exclude intruders, much less the power to bring to court transgressors of all sorts -- trespassers, shoplifters, contract breachers, copyright infringers -- would be a mere assertion.[66] But if no property can be securely enjoyed without the assistance of the state, it can be argued that the state has created all property and so, as some claim Congress may do with the copyright species of property, the state may take the property it has created without compensating its owners. And the advocates of this position could add that no one's expectations would be unfairly disappointed if such a thing came to pass because every owner knew that the state might change the rules of the property game at any time[67] -- the invisible fine print at the bottom of every deed, contract or copyright. But if that were the case, then neither the takings clause nor the clause forbidding the state to impair contracts would have any meaning at all.[68] No property would be secure, and every change in governments would carry with it a profound threat to the integrity of all existing economic arrangements. Fortunately, this possibility has been routinely resisted by the constitutional cases that have raised it. Mr. Justice Holmes, writing for the Court in Pennsylvania Coal Co. v. Mahon,[69] noted that "some values are enjoyed under an implied limitation and must yield to the police power."[70] But he stressed: "obviously the implied limitation must have its limits, or the contract and due process clauses are gone."[71] The limit drawn there, and still observed, was that when the government's actions substantially diminish the values incident to a property right, "in most if not in all cases, there must be . . . compensation to sustain the act."[72] And in the case of the bills under current consideration by Congress, there could scarcely be a plainer, or more patently "substantial", reduction in the value of the affected copyrightholders' rights than to eliminate their control over when and on what terms their property -- their films -- will be available for viewing, an availability that, after all, constitutes the only real value of their film properties.

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[66] *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

[67] *See* discussion of *Home Building & Loan Association v. Blaisdell*, text at notes 73-75, *infra*.

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[68] See, e.g., L.Tribe, American Constitutional Law 467, 469 (1978).

[69] 260 U.S. 393 (1922).

[70] Id. at 413.

[71] Id.

[72] Id.

The Supreme Court has allowed government significantly to impair the beneficial value of important property rights -- i.e., to "take" property -- without compensation only in the most limited and extreme circumstances. In Home Building & Loan Association v. Blaisdell,[73] the Supreme Court upheld the Minnesota Mortgage Moratorium Law of 1933, which allowed state courts to extend the period of redemption from mortgage foreclosure sales for a "just and equitable" time not beyond May 1, 1935. But this measure was enacted at the trough of the Depression and required that extensions be granted only after issuing an order that the mortgagor pay all or a reasonable part of the property's income or rental value. The Court's reliance, in dictum, on the state's argument that all contracts are made subject to the power of the state to change their terms has been rejected by subsequent cases.[74] No remotely comparable emergency, and no similar guarantee of subsequent payment, can sustain Congress' retroactive taking of the property owned by current copyrightholders of works that may be broadcast by television.[75] And there can be no doubt that the proposed taking would disappoint the "investment backed expectations" held to be protected by the takings clause in Kaiser Aetna v. United States.[76] The copyright in audiovisual works has been codified since 1912, and producers in the nearly seven decades that have elapsed since that time have been able to rely on the security of their exclusive right to control reproduction of their works in deciding to invest in them. To change those rules now, and to apply the altered regime to films produced under the prior rules, would be to take hostage their investment not for any national emergency, but on no more principled a ground than that an easy means to steal their property had been sold by private firms to thousands of understandably eager and no doubt well-meaning consumers -- as though burglary should be legalized once enough people purchase their own crowbars.

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[73] 290 U.S. 398 (1934).

[74] See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

[75] Congress' taking, it should be remembered, may include expectations going as far back as the common law, see note 23, supra; 1909, when the first Copyright Act was passed; 1912, when Congress created special protection for motion pictures; or 1976, when the new Act was passed.

B. FAIR USE -- PAST AND PRESENT

Rather than attempt to claim that it is permissible to take the property of copyrightholders because Congress is merely revoking a beneficence it bestowed long ago, those who support the revocation of these valuable property rights may claim that Congress in fact never gave these rights in the first place -- that there has always been a fair use exception to the copyright laws for noncommercial, in-home VTR recording, and that Congress is only making this much clear. There are two fatal flaws in this argument: it is wrong, and even if it were right, it is for the courts, not Congress, to say so.

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[76] 444 U.S. 164 (1979).

1. MISTAKES IN, AND TAKINGS BY, THE DISTRICT COURT

First, the copyright law, as it stands, does not exempt VTR copying. 17 U.S.C. §106 provides that:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords; . . .

The Court of Appeals correctly understood that such language must be read as creating broad protection for copyrighted works, and that the courts "should not, absent a clear direction from Congress, disrupt this framework by carving out exceptions to the broad grant of rights apart from those in the statute itself."[77/] This elementary rule was recently underscored by the Supreme Court when it advised lower courts interpreting the patent statute not to "'read into the patent laws limitations and conditions which the legislature has not expressed.'"[78/] The District Court ignored this maxim and read the statute's guarantees narrowly because its language was broad. Relying on scattered fragments of the legislative history of the 1971 Sound Recording Act rather than on any of the words of the copyright statute, the District Court found that the copyright statute was not intended to cover noncommercial VTR home recordings.[79/]

[77/] 659 F.2d at 966.

[78/] Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980).

[79/] 480 F.Supp. 429 (1979).

Several instances relied on by the District Court to infer that Congress intended to allow wholesale VTR taping of televised copyrighted works were not even part of the official legislative record issued by Congress to assist in the interpretation of the statute. The episodes of legislative history surveyed by the District Court include a brief discussion between Representative Beister and then Assistant Register of Copyrights Ringer during a hearing of Subcommittee No.3 of the House Committee on the Judiciary where Ms. Ringer assured Representative Beister that his son's tape recording of popular songs off-the-air from his radio would not constitute record piracy under the Sound Recording Act of 1971.[80/] No mention was made of videotaping, nor did the Court even address the basic principle that opinions expressed at committee hearings are not binding law unless incorporated into the statute itself.[81/] During floor debate on the bill, Representatives Kastenmeier and Kazen had a similar discussion in which Kastenmeier assured Kazen that his child would not be penalized by the 1971 Act if she recorded radio or television programs for her own listening.[82/] Again, no mention was made of videotaping. Finally, the District Court cited a 1961 report

[80/] *Id.* at 445.

[81/] *Railroad Retirement Board v. Duquesne Warehouse Co.*, 149 F.2d 507, 510 (D.C.Cir. 1945), aff'd 326 U.S. 446 (1946).

[82/] 480 F.Supp. at 446.

by the Register of Copyrights, a report referred to even by the District Court as "outside the legislative history" of the Copyright Act, which advocated an exemption from the copyright laws for noncommercial recordings of televised copyrighted programs because technical advances would some day make such recording possible and unpoliceable.[83/]

To create a multi-billion dollar, retroactive exception to the copyright laws on the basis of these spare statements -- statements made before VTR's were even commercially available for home use, and made in regard to an Act not even before the District Court -- is so radical a departure from established practice that, as applied to existing copyrights, the lower court's ruling could itself be regarded quite reasonably as at least a compensable, if not a wholly void, taking of private property.[84/] Indeed, the Court of Appeals appears to assume that the District Court simply forgot that there was a statute directly dispositive of the issue before it: "Our study of the record . . . convinces us that the district court inadvertently bypassed the statutory framework of the 1976 legislation."[85/]

The second fragment of the legislative history examined by the District Court, the only piece that might be considered

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[83/] Id.

[84/] Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

[85/] 659 F.2d at 966.

part of an official legislative record, was the House Report on the Sound Recording Act of 1971, part of the official legislative record of the wrong statute, in which the Committee specified that it was not its intention to forbid home recording of audio broadcasts. But the very quotation about "common and unrestrained" home recording relied upon by the District Court[86] suggests that it was not intended to apply to VTR recording: VTR recording was not "common" or "unrestrained" in 1971, in part because VTR machines for home use had not then even been marketed. Furthermore, because sound recordings had never enjoyed copyright protection until the 1971 Act extended it, no reasonable investment-backed expectation could be disappointed by the Act's failure to change home recording practices. Motion pictures, on the other hand, have enjoyed statutory copyright protection since 1912. Finally, it is strange that the District Court would rely on this statement of congressional intent when it was nowhere reproduced in the official lgislative history of the Copyright Act itself, even though other fragments of the 1971 House Report were incorporated verbatim into the House Report for the 1976 Act.[87] Time and again, the 1976 Act distinguishes sound recordings and audiovisual works. As copyrightable materials, they are separately classified in the Act.[88] Audiovisual works are specifically excluded from some of the exceptions to the Act.[89] The special protection of such works reflects an entirely understandable legislative distinction: audio recorders have a substantial number of noninfringing applications,[90] while the overwhelming majority of VTR tapings infringe copyrighted works;[91] listeners may enjoy a sound recording hundreds of times before they tire of it,[92] a premise that sustains the marketing of records by radio, while only a couple of viewings of an audiovisual work will exhaust audience interest in it;[93] and the investment in audiovisual works is likely to be substantially greater than the cost of producing and marketing an audio recording.[94]

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[86] U.S. Code Cong. & Admin. News 1971, 1566 at 1572.

[87] 3 Nimmer on Copyright, §13.05[F][5] at 13-96, n.159.

The District Court's reliance on the quoted passage in the 1971 House Report is especially troublesome when considered against other, more germane pieces of the legislative history which show a specific intention to protect audiovisual recordings. The same House Report stated that a suit for copyright could be sustained "if there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on videotape . . . ."[95] The House Report also indicates that the Sound Recording Act of 1971 was not intended to apply to sound accompanying motion pictures.[96] The 1976 Copyright Act specifically excludes "sounds accompanying a motion picture or other audiovisual work," from the definition of sound recordings.[97] Against this background, the District Court nevertheless found that the Congress intended VTR recording to be exempted from the coverage of the Copyright Act of 1976 because these transgressions constituted "fair use" of the copyrighted material.[98] This finding flies not only in the face of the language of the statute, but of the legislative history as well. The Senate Report on the Copyright Act of 1976 states that the "committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstnaces, be considered 'fair use'."[99] The Senate Report stresses that the

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[88] 17 U.S.C. §102(a)(6) secures a copyright in "motion pictures and other audiovisual works," while subsection (a)(7) covers "sound recordings."

[89] See §§ 108(h), 110(1), 112(a).

[90] E.g., live voice recordings.

[91] See note 53, supra.

[92] See 21 Santa Clara L.Rev. 49, 64-65 & n.99 (1981).

[93] Id.

[94] See 659 F.2d at 967 n.4.

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[95] H.R. Rep. No. 487, 92d Cong., 1st Session, reprinted in 1971 U.S. Code Cong. & Admin. News 1566, 1571.

[96] *Id*. at 1570.

[97] 17 U.S.C. §101 (Supp. II 1978).

[98] 480 F.Supp. at 456.

[99] Sen.Rep. No. 473, 94th Cong. 2d Sess. 66 (1976).

"doctrine of fair use would be applied strictly to the . . . reproduction of entire works, such as . . . audiovisual works, including motion pictures, which by their nature are intended for performance or public exhibition."[100] And the House Report on §108(h) indicates that the fair use exemption should be more narrowly applied to audiovisual works.[101]

Section 107, the "fair use" exception, codifies, but does not "enlarge . . . in any way . . .,"[102] the doctrine of fair use developed and applied under the 1909 Copyright Act. It reads:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

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[100] *Id.* at 64 (1975).

[101] 1976 U.S. Code Cong. & Admin. News at 5692.

[102] *Id.* at 5860.

Despite the special solicitude Congress has shown for the copyright interest in audiovisual works, and despite the repeated warnings that the fair use exception should be narrowly applied to these works, the District Court found in §107 a previously undiscovered loophole in the copyright laws. This departure was particularly unwarranted, as the Court of Appeals noted, because the fair use exception had been applied before only to allow the productive use of copyrighted material, such as in education, criticism, comment, or scholarship, and not to the "consumptive use" of copyrighted material such as in entertainment.[103/] The statute itself lists the fair uses it will exempt, each a productive use, and then asks the court to apply the four statutory factors to determine whether, in a particular case, even these specific uses are legitimate.[104/] This same error, overlooking the productive use requirement, underpins the District Court's contention that the statute exempts home VTR use because such use is "noncommercial."[105/] That contention ignores the clear contrast that the statute draws not between commercial and noncommercial uses, but between commercial uses and nonprofit educational uses. Labelling consumptive uses noncommercial is error on simple definitional

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[103/] *See* 659 F.2d at 970; 66 Va. L.Rev. 1005, 1012-14.

[104/] *See* L. Seltzer, Exemptions and Fair Use in Copyright 24, 37-38 (1978).

[105/] 400 F.Supp. at 449-50.

grounds: even ignoring the obvious and massive commercial interest Sony has in the misappropriation of copyrights, consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the homemade tape because the consumer will not buy tapes separately sold by the copyrightholder. The error in excusing such theft as "noncommercial" can be seen by simple analogy: jewel theft surely is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold.

Finally, the lower court's treatment of the substantiality issue was also clouded by its failure to consider the consumptive use issue. Copying of an entire copyrighted work has never been excused as a fair use,[106] even in the educational context.[107] Aside from the District Court's opinion, the only other decision upholding the copying of an entire work as a fair use, often referred to as the Dred Scott decision of copyright,[108] is Williams & Wilkins Co. v. United States,[109] in which the Court of Claims upheld as fair use the copying of complete magazine articles by the National Library of Medicine and the National Institute of Health. The court in Williams & Wilkins upheld the use chiefly, as the Court of Appeals in Sony noted, because of the "serious damage to medical science that would result if it held for the plaintiff."[110] However,

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[106] 3 Nimmer on Copyright, §13.05[D], 13-61.

[107] Encyclopedia Britannica Educational Corp. v. Crooks, 447 F.Supp. 243 (W.D.N.Y. 1978).

[108] 487 F.2d at 1387 (Nichols, J., dissenting).

[109] 487 F.2d 1345 (1973), aff'd per curiam by an equally divided Court, 420 U.S. 376 (1975).

> [i]n this case, there is no corresponding countervailing societal benefit to 'weigh' against the interests of the author. We do not mean to say increased access to such Disney products as 'Chip and Dale/Mixed Nuts' is not a benefit to society. We mean only to say that the consequences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in Williams and Wilkins Co. [111]

2. CONGRESS IN AND AS A COURT

But Congress may claim that, in passing a bill extending the fair use exemption, it is not doing anything quite so bold as essaying the retroactive repeal of property rights. Instead, Congress may claim that it is only "clarifying" the law of fair use as it has always been, and that the law of fair use, rightly understood, has always exempted home VTR recording -- despite the contrary analysis summarized above. That possible claim, apart from its demonstrable implausibility as a substantive matter, grossly misconceives the institutional role of Congress and the courts.

First, the current Congress is without capacity to shed light on the issue of fair use by instructing the courts as to the actual intent of prior Congresses in passing the Copyright Act. Any such "clarification" by Congress in 1981, as to the intent of the Congresses that sat in 1976 or 1971 or 1912 or 1909 -- or in any of the intervening years in which other Congresses have protected the copyright in movies and televised works -- would, as the Supreme Court has held -- repeatedly, be of virtually no use in interpreting the intentions of those earlier legislatures.[112] Different persons serve in Congress now than served in Congress then, and a "clarification of intent" by this Congress would reveal only its own wishes and not the inner workings of minds made up long ago.

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[110] 659 F.2d at 971.

[111] Id.

More fundamentally, Congress would not only be wrong in fact if it asserted that the law had always contained the VTR exception; it would be wrong in constitutional law even to inject any such assertion into the inherently judicial process of construing extant laws. Chief Justice John Marshall said it best in 1803: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[113] Implicit in the separation of powers is the postulate that Congress cannot constitutionally claim to sit as a court and, through judicious rereading of a statute, retroactively give it a meaning that reviewing courts have not found the statute to contain.[114]

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[112] United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968); Haynes v. United States, 390 U.S. 85, 87 n.4 (1967); United States v. Price, 361 U.S. 304, 313 (1959); Rainwater v. United States, 356 U.S. 590, 593 (1958).

[113] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

Congress might try to evade these broad institutional limitations of its role by the expedient of instructing the courts as to the proper determination of intent in the *Sony* case itself, but that seemingly narrower option too is constitutionally foreclosed -- in this instance by the long-settled rule of *United States v. Klein*, which establishes that Congress may not, while a case is pending on review before the Supreme Court, instruct the Federal Judiciary on the proper resolution of the claims put forth therein. Were Congress to ignore that rule, "[w]e must think that Congress [would have] inadvertently passed the limit which separates the legislative from the judicial power."[115]

Even if one concedes for the moment -- but only for just a moment -- that Congress has any such power retroactively to "clarify" the law, it does not necessarily follow that Congress may use such power to enrich a chosen few at the expense of copyrightholders. If Congress chooses the "clarification" route rather than a straightforward repeal of copyright protection, the constitutional infirmity of the resulting taking for private use may be all the more easily discerned. By behaving like a court -- by adjusting the claims as between the particular parties already engaged in litigation -- Congress would not only act in a manner that courts have for nearly two centuries deemed inherently judicial, but would also open itself to even closer substantive scrutiny of its legal decisions than might otherwise be appropriate. In matters of economic and social policy, judgments made by Congress that its laws benefit the public and do so at reasonable cost are generally and deferentially respected by the courts because it is often beyond the competence and outside the institutional authority of the courts to review such matters of degree. But courts are ideally and constitutionally equipped to review questions of law. Once Congress tries its hand at the interpretation of statutes, the defects in the District Court's analysis of fair use take on constitutional significance. That court's analysis failed to uncover any productive or derivative uses to be served by a home VTR exemption. By exposing for scrutiny the exclusively private uses of home VTR recordings, the District Courts' failed reasoning highlights the unconstitutionality of the same taking if committed by Act of Congress. If Congress makes a judgment that the copyright laws have always exempted VTR recording of copyrighted works -- a judgment that, on the merits, is simply and egregiously incorrect -- the courts may quite properly be tempted to use the transparent falsity of Congress' "finding" to impeach Congress' claim that what it is doing is "interpreting" the copyright law. Rather, Congress will, in all likelihood, be found to have taken property not only without compensation, but without exercising constitutionally appropriate authority. In judgments of law, unlike choices of social policy, Congress has nothing even approaching an unreviewable right to be wrong.

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[114] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 120-24 (1976); *Chadha v. INS*, 634 F.2d 408, 431 (9th Cir. 1980), probable jurisdiction postponed, 50 U.S.L. Week 3244 (1981).

[115] 80 U.S. (13 Wall.) 128, 146-47 (1872).

C. PRIVACY AND PUBLICITY, FREE SPEECH AND LISTENING FOR FREE

A final category of argument might be invoked to claim that copyrightholders never really possessed a right to control this copying of their works. That argument would be based on a misunderstanding of the First Amendment and of Congress' relation to it. Copyrightholders' works, the argument goes, were lost to the "public domain" once they were broadcast on the public airwaves and into private homes.[116] In fact, the argument continues, the First Amendment may actually require that the public be able to record televised works, and it at least permits Congress to promote the public's right to listen by allowing VTR owners freely to record these works and VTR manufacturers freely to profit from the desire of consumers to do so.[117]

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[116] See, e.g., 480 F.Supp. at 453.

[117] Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

This argument simply will not wash. Resort to the "public domain," electronic or otherwise, in no sense invites Congress to permit piracy -- any more than Congress' plenary power over navigable waters permits any such subordination of the private rights of some to the greed or enjoyment of others.[118] Indeed, the claim that, because the public "owns" the airwaves and has a right to hear as well as to speak, Congress may not secure copyrights that conflict with these First Amendment rights and is thus compelled to allow VTR taping, has been routinely, and rightly, rejected by the courts.[119] The Constitution commands Congress not to abridge freedom of speech, but it also permits Congress to protect copyrights. "The first amendment is not a license to trammel on legally recognized rights in intellectual property."[120/]

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[118] *See* *Kaiser Aetna v. United States*, 444 U.S. 163 (1979).

[119] *See* *United States v. Loew's, Inc.*, 371 U.S. 38, 48 (1962) ("A copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than on a movie screen."); *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 349, 353 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965). The new Federal Communications Act specifically denies that federal communications policy protects the unauthorized recording of copyrighted materials broadcast over the public airwaves: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions in this chapter are in addition to such remedies." 47 U.S.C. §414. *See also* *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 406 n.11 (1974) (the FCC has consistently contended that it is without power to alter rights enamating from other sources, including the Copyright Act. . . . This position is consistent with the terms of the Communications Act of 1934 . . . ."). The argument that copyright protection disappears whenever copyrighted works appear in a public place would undo the protection of books stored in public libraries, artwork on public exhibit, and sporting events in public arenas or perhaps simply within public view. *See* 21 Santa Clara L.Rev. 49, 71 (1981).

Nor does the fact that the direct infringement of copyrightholders' rights occurs in private places undo their copyrights or otherwise alter this analysis. Those who sell equipment usable only for theft are not excused simply because the theft they make possible is committed in the home. Utilities are permitted to inspect and protect their property even though much of it is in private residences, and the telephone company routinely polices abuses of its property even though many such abuses, such as black-box long distance calls, are committed in the home and manifestly promote free speech. It may be that direct government policing of forbidden VTR uses could raise threats to constitutionally secured privacy, but that is not an argument for casting aside constitutionally protected property; it is precisely an argument in favor of just compensation rather than outright confiscation _or_ instrusive control. Indeed, the motion picture industry has not, to my knowledge, proposed in-home policing of its property rights; both in the courts and in Congress, the industry's focus has been upon the quite public corporate activity that profits from what homeowners would like to do.

[120/] _Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc._, 600 F.2d 1184, 1188 (5th Cir. 1979).

The proposition that the sins facilitated by manufacture and sale of the VTR are ultimately committed in too private a place for the government to protect the private property that is literally taken there is curiously advanced alongside its converse: that televized works are shown over the airwaves, too public a place for copyright owners to claim that--they still own their works once they are transmitted through that medium. Both arguments, as shown above, fail. But even if the Constitution does not require Congress to open the airwaves for VTR taping, or to close private homes (and those who sell to homeowners) to the application of anti-piracy rules, it might be proposed that the Constitution permits Congress to do so if Congress determines that so doing would, on the whole, promote First Amendment freedoms. That proposal, too, is fatally flawed -- this time, because it reads the command of the First Amendment precisely backwards. The First Amendment is a restriction on the power of Congress, not a grant of any authority at all. The argument is also flawed because it assumes that Congress, not the courts, should determine the ultimate scope of First Amendment protection. That assumption inverts the rule of Marbury v. Madison,[121] a rule that applies with undiluted strength in such a case as this one, where the interpretation of a constitutional clause (here, the First Amendment) is at stake and where, unlike the Fourteenth Amendment or the Copyrights Clause, Congress is not responsible for the implementation of the constitutional provision in question.

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[121] 5 U.S. (1 Cranch) 137 (1803).

The final flaw in the argument that Congress may remove protection from existing copyrights to protect or facilitate free speech is that the retroactive removal of copyright protection would itself endanger, and might indeed impermissibly abridge, First Amendment rights. It is perhaps obvious that motion picture and television producers will speak less often if the reward for their efforts is greatly reduced.[122/] VTR owners may then enjoy an expanded right to look, but there may be less to look at -- and such viewers' rights as remain will come at the expense of those members of the viewing public who either cannot afford VTR's[123/] or who choose not to violate the copyright laws. It will also come at the expense of the First Amendment freedoms of copyrightholders. Many authors would have chosen not to speak, or would have chosen to say something very different, if copyright protections had always been as lax as the pending bills propose to make them. If one of these bills passes, some authors will simply choose not to speak -- some filmmakers, not to broadcast -- on television. Other authors may speak, and other filmmakers may

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[122/] See 66 Va. L.Rev. 1005, 1017 (1980); 31 Stan. L.Rev. 243, 244 (1979).

[123/] Compare, e.g., Schneider v. Town of Irvington, 308 U.S. 147 (1939) (protecting public pamphleteering as "poor man's printing press").

agree to the televised broadcast of their works and products, but only because they must do so to cut their losses on once-profitable speech and film. Their "speech" will, in a sense, be compelled by an economic necessity forced on them by a snare of Congress' making. And what of the "speech" consisting of television broadcasts that could be made -- if Congress were to apply these new copyright rules to pre-existing film properties -- only on terms that were never envisioned by the speakers and actors involved at the time they made their initial contracts, or by the film producers at the time they made their initial investments? Such "speech" would be even more literally compelled -- no less so, indeed, than if materials once entitled to federal protection were suddenly to be transmitted by the Federal Government, over the author's objection, to an eager audience, an audience equipped with a copying device manufactured and sold without payment of any fee to those whose labor and investment the device was specially designed to capture. It is axiomatic that, in a system of free speech, authors must not only be able to speak freely, but must not be made to speak against their will.[124] Yet that is what they must do if Congress decides that free speech is less important than listening for free.

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[124] See *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); Cf. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

CONCLUSION

Here we have come full circle. What Congress proposes to take without compensation is not only property, but liberty as well, because copyright is a special kind of property -- a right to possess, and to control the reach of, one's own expressions. This is not to say that Congress' copyright offspring are immortal once they are born: the Constitution allows copyright and patent protection only for limited periods of time.[125] What is sought by the copyrightholders who petition Congress is that Congress not repeal, without compensation, the protection of their expressions. They do not ask for eternal protection of their works, only protection for the period that Congress has itself established. All copyrights, once created, must someday die; but they may not be wantonly destroyed.

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[125] United States Constitution, Article I, §8, cl.8.

RESPONSE TO PROFESSOR TRIBE'S MEMORANDUM ON ISSUES OF COPYRIGHT COMPENSATION UNDER CONSTITUTIONAL LAW

This memorandum responds to the principal contentions of Professor Laurence H. Tribe of Harvard University Law School in his draft "Memorandum of Constitutional Law on Copyright Compensation Issues Raised by the Proposed Congressional Reversal of the Ninth Circuit's Betamax Ruling" (December 5, 1981), "prepared for use by, and under the auspices of, the Motion Picture Association of America, Inc."[1] The Tribe Memorandum attacks the constitutionality of bills pending in the 97th Congress[2] that would grant an exemption in the Copyright Act for the private use of off-air recordings of television broadcasts using video cassette recorders (VCRs).[3] Tribe contends that the proposed exemption would constitute an unconstitutional taking of private property under the Fifth Amendment of the Constitution.

This memorandum examines and rejects, as unsupported by the law and the facts pertaining to the uses of VCR technology, the four principal contentions of the Tribe Memorandum, which are:

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[1] The legend revealing that the Tribe Memorandum, as it is referred to in this memorandum, was prepared for the Motion Picture Association is on the cover page of some, but not all, of the circulating copies of the Memorandum.

[2] _See_ Note 1 of Tribe Memorandum.

[3] Professor Tribe refers to the devices as video tape recorders (VTRs). The terms are synonymous.

(i) with few exceptions, any governmental action, including the proposed exemption, that causes a substantial diminution in the value of private economic interests constitutes a taking within the meaning of the Fifth Amendment to the U. S. Constitution for which just compensation is required;[4/]

(ii) the proposed exemption would constitute a taking for a private purpose and such a taking would be unconstitutional;[5/]

(iii) the proposed exemption does not fall within the exceptions to the requirement for just compensation applicable to nuisances and conditions arising from extreme circumstances;[6/] and

(iv) Congress does not have the authority to enact the exemption because it would usurp the judicial function of resolving a pending dispute.[7/]

[4/] See Tribe Memorandum at 2 et seq.

[5/] Id at 4 et seq.

[6/] Id. at 22 and 28 et seq.

[7/] Id. at 39-43 and 29.

I. Governmental Action That Has a Substantial Impact on Private Economic Interests Does Not By Itself Constitute a Taking Requiring Compensation; Moreover, The Proposed Exemption Has Not Been Shown To Have A Substantial Impact on The Rights of Existing Copyright Holders.

A. Impact of Governmental Action on Private Economic Benefits Does Not Constitute a Taking.

Tribe asserts in his Memorandum that "regulatory changes bearing on a property interest's use that substantially undercut a separately identifiable component of the property's economic worth without corresponding reciprocal gain to the owner -- changes such as [that proposed by Congress in connection with the private use exemption from the Copyright Act] -- clearly constitute compensable takings."[8] (Emphasis in original.) This assertion is both factually unsupported and legally incorrect. As to the former, which will be discussed further in section I.C. below, Tribe contends throughout his Memorandum that adoption of the exemption will result in grave harm[9] to copyright holders and even "piracy"[10] of their economic interests; yet, nowhere in the Memorandum does he substantiate such assertions nor was such economic harm found by either the District Court[11] or the Court of Appeals.[12] Moreover, the assertion of Tribe as to the legal effect of governmentally caused economic harm is also incorrect.

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[8] *Id*. at 22.

[9] *Id*. at 12.

[10] *Id*. at 44.

[11] *Universal City Studios, Inc. v. Sony Corporation of America*, 480 F. Supp. 429 (C.D. Cal. 1979).

Numerous decisions of the U. S. Supreme Court during this century have rejected the notion that legislative action that has an impact on private economic interests is sufficient in itself to constitute a taking giving rise to the requirement of just compensation.[13] As the Supreme Court stated in a recent decision: "[T]his Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values."[14] In explaining its decisions under the just compensation clause of the Fifth Amendment the Court reasoned that it may more readily find a taking when "interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[15]

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[12] *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F.2d 963 (9th Cir. 1981).

[13] *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 409-410 (1915); *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 389 (1926); *United States v. Willow River Power Company*, 324 U.S. 499, 510 (1945); *United States v. Central Eureka Mining Company*, 357 U.S. 155, 168 (1958); *Agins v. City of Tiburon*, 447 U.S. 255, 262-263 (1980).

[14] *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978).

[15] *Id.* at 125.

Over the years the Court has refused to require compensation, for example, for the owners of a brickyard forced out of business by a local ordinance making it unlawful to operate a brickyard within the city limits, even though the brickyard had gone into operation well before the city limits had encompassed it;[16] for the owner of a gold mine required to cease operations because of a regulation ordering the closing of gold mines;[17] and for the owners of a sand and gravel business prevented from continuing their business by an ordinance that prohibited excavations below two feet above maximum water level even though the ordinance effectively required the cessation of operations that had been ongoing for thirty-one years prior to its adoption.[18] Thus merely because some property owners are more burdened than benefited by a law does not give rise to a taking requiring just compensation.[19]

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[16] *Hadacheck v. Sebastian*, 239 U.S. at 410.

[17] *United States v. Central Eureka Mining Company*, 357 U.S. at 168.

[18] *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

[19] *Penn Central Transportation Company v. City of New York*, 438 U.S. at 134-135.

Professor Michelman of Harvard University Law School has identified from judicial decisions and legal commentary four factors that have "usually been deemed critical in classifying an occasion as compensable or not:"

As part of his contention that enactment of the proposed exemption would constitute a taking without just compensation, Tribe argues that such action by Congress would upset the existing expectations of motion picture copyright holders.[20] There are two responses to this contention. First, regulation of copyrights is left largely to the discretion of Congress. Second, the Supreme Court has rejected contentions of compensable takings in a large number of cases involving vested property rights.

As to the first response, Professor Lyman Ray Patterson has observed that the courts historically look to Congress for solutions to copyright problems.[21] Moreover, the Supreme Court

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(Footnote Continued)

> "(1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people."

Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1183-1184 (1967). Adoption of the proposed exemption would not constitute a compensable taking under any of the four tests advanced by Professor Michelman.

[20] Tribe Memorandum at 26-29.

[21] Patterson, Private Copyright and Public Communication: Free Speech Endangered, 28 Vand. L. Rev. 1161, 1197 (1975).

has recognized the broad discretion of Congress to regulate copyrights.[22] Further, as discussed above, Tribe has not substantiated his claim that adoption of the proposed exemption would have a detrimental impact on the economic interests of copyright holders. As a result, there is no evidence that any vested economic interests would be upset by the adoption of the proposed exemption.

As to the second response to Tribe's concern about the economic rights of existing copyright holders, in a large number of cases the Supreme Court has rejected claims that upsetting established vested economic interests warrants compensation. For example, the Court rejected the contention that a Congressional statute constituted a compensable taking by expanding the number of beneficiaries of oil and gas royalties, thereby reducing the proceeds for the original class of recipients after thirty-four years of payments under the old statute.[23] The Court characterized the new statute as a mere reallocation of royalties. In another case the Court stated that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."[24] As the

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[22] See, e.g., Goldstein v. California, 412 U.S. 546, 562 (1973); see also Evans v. Jordan, 9 Cranch. (13 U.S.) 199 (1815) (patents).

[23] United States v. Jim, 409 U.S. 80, 82 (1972).

[24] Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 16 (1976).

Court observed almost a century ago, "the State did not . . . give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged."[25/] Existing holders of motion picture copyrights acquired copyright protection by Act of Congress, and Congress can adjust the terms of their monopolies to serve broad public purposes, especially where the impact on their bundles of rights and related economic interests would be insignificant.

Thus the Supreme Court has made quite clear on numerous occasions that government can adjust the "benefits and burdens of economic life to promote the common good"[26/] without fear of violating the Constitution by failing to compensate those whose economic interests may thereby be affected.

25/ Mugler v. State of Kansas, 123 U.S. 623, 669 (1887).

26/ Penn Central Transportation Company v. City of New York, 438 U.S. at 125.

B. Even a Substantial Diminution in the Value of Economic Interests Resulting from a Governmental Action Does Not Necessarily Constitute a Compensable Taking.

In his Memorandum Tribe asserts that Congressional enactment of the proposed exemption will result in "losses to the owners of copyrights that are far beyond merely 'substantial'"[27] and that such diminution in value constitutes a taking requiring just compensation to the owners. First, Tribe gives no factual support for that assertion and others like it throughout the Memorandum. Second, a substantial diminution in the value of property rights or economic interests does not in itself give rise to a compensable taking under the Fifth Amendment. The Supreme Court reiterated its view on this issue in a recent decision by citing two earlier cases in which the Court had sustained governmental regulations that resulted in diminutions in value of 75 and 87 1/2 percent.[28] As Professor Joseph Sax has observed: "Skepticism about the vitality of the diminution of value test would appear thoroughly justified."[29] Moreover, the Supreme

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[27] Tribe Memorandum at 19-20.

[28] Penn Central Transportation Company v. City of New York, 438 U.S. at 131.

[29] Sax, Takings and the Police Power, 74 Yale L.J. 36, 44 (1964). After analyzing relevant Supreme Court cases, Professor Sax concluded:

Court has recently reiterated that even though governmental action prevents "the most profitable use" of private property, "that is not dispositive" because "a reduction in the value of property is not necessarily equated with a taking."[30]

According to Professor Michelman, to determine whether a governmental action constitutes a compensable taking it is necessary to focus on the interest "injuriously affected" and to inquire what proportion of its value is destroyed: "If this proportion is so large as to approach totality, compensation is due; otherwise, not."[31] In his Memorandum Tribe has not offered any substantiation for his assertions that the value of existing copyrights would be diminished by the proposed exemption; and

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(Footnote Continued)

> "The diminution of value test gives a highly unreal view of the actual working of the compensation rule in American law. Destruction of recognized economic interests, on the ground that there is no property interest, is so widespread and pervasive that the policy of preventing individual economic loss as such, can hardly be said to have been given significant recognition by the courts."

Id. at 53.

[30] Andrus v. Allard, 444 U.S. 51, 66 (1979). See also Mugler v. Kansas, 123 U.S. 623, 664 (1887); United States v. Central Eureka Mining Company, 357 U.S. at 168.

[31] 80 Harv. L. Rev. at 1192.

certainly there is no proof that the exemption for private use of VCR technology would result in the total destruction of the value of the copyrights. The Supreme Court has rejected mere speculation on the effect of governmental action on the marketability of property interests as the basis for a compensable taking.[32/] In the next part, this memorandum directly challenges Tribe's factual assumptions about the effect of the proposed exemption on the economic interests of existing copyright holders.

C. Economic Interests of Existing Copyright Holders Will Be Affected Very Little, If At All, By the Adoption of the Proposed Exemption.

In asserting that adoption of the proposed exemption would substantially dilute the value of the copyright holders' economic interests, Tribe fails to acknowledge two primary facts, while conceding a third, which suggest that no such dilution in value would result. First, there are a number of noninfringing uses of VCR technology -- for home movies, recording of noncopywritten material, playing of noninfringing video cassettes purchased or rented for that purpose, and industrial purposes -- none of which have any impact on the value of the existing copyrights. Second,

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[32/] Village of Euclid v. Ambler Realty Company, 272 U.S. at 397.

as Tribe concedes, time-shifting -- the primary use for VCR technology -- will increase rather than decrease the size of television audiences.[33] Finally, and most significantly, copyright holders can negotiate with distributors and television networks for sufficient compensation to account for the use of VCR technology. In fact, the Nielsen television program rating system currently reflects actual VCR usage so that relevant information is available to permit such negotiations in the marketplace;[34] and such information on VCR usage can be easily augmented. Because the marketplace can effectively operate to compensate copyright holders for VCR usage, a compulsory licensing or royalty scheme, which Tribe seems to favor,[35] would result in twice-payment to copyright holders, costs that would be passed on to consumers of television broadcasting. The first payment would be in the form of increased prices for products to cover additional advertising costs. Such costs would be imposed by broadcasters because of larger television audiences that would result from VCR time-switching. The second payment would be like a tax in the form of the royalty or license fee imposed on video tapes or VCR equipment.

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[33] Tribe Memorandum at 22. The widespread use of VCRs for time shifting was acknowledged by a television network executive who stated in a recent issue of a news magazine: "With their recorders, people are assuming more control over their TV sets. . . ." Newsweek, Feb. 22, 1982, p.77.

[34] Professor Tribe incorrectly asserts that "there is no reliable way for advertisers to establish" VCR usage. Tribe Memorandum at 13.

[35] *Id.* at 20. Tribe's conclusions about the "success" of the Copyright Royalty Tribunal in compensating copyright holders are directly contrary to the views of the Tribunal's chairman, who has recommended its abolition, Copyright Office, The U.S. Patent and Trademark Office, and the Copyright Royalty Tribunal, Oversight Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 1st Sess. 53 (1981)(testimony of Clarence L. James, Jr., Chairman, Copyright Royalty Tribunal), and the U.S. General Accounting Office, which has advised Congress of substantial problems in the organization

Professor Sax has observed that "the costs of accommodating conflicting claims on the common resource network need not be borne by the public as a matter of constitutional law."[36] One way of resolving the conflicting claims, according to Professor Sax, is through private negotiations.[37] Such an approach can work where, as here, adequate information is available about the market, which allows distributors, broadcasters, advertisers, and copyright holders to negotiate compensation for VCR usage. Overlaying a royalty payment scheme on top of the operation of the market would result in a windfall for copyright holders.

(Footnote Continued)

and operation of the Tribunal. Id. at 94-102 (statement of Wilbur D. Campbell, Deputy Director, Accounting and Financial Management Division, General Accounting Office).

[36] Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 177 (1971).

[37] Id. at 173.

An even more fundamental fact that Tribe does not address in his Memorandum pertains to the bundle of rights possessed by each copyright holder, only one strand of which is affected by off-air recording for private use. While asserting that the "entire right to copy is lost if [VCR] taping is permitted,"[38] Tribe ignores the large bundle of rights that would continue to be held by copyright holders if the exemption is adopted: exclusive broadcast rights, exclusive reproduction and sale rights for public showings, and exclusive reproduction and sale rights for audiovisual tapes, cassettes, discs, and pay television. Only the recording of television broadcast material for noncommercial, private uses would be permitted by the proposed exemption; and copyright holders can continue to control the order of distribution of their materials for prerecorded video cassettes and discs and for television broadcasting to maximize their profits.[39] Therefore, just as the Supreme Court observed in rejecting an allegation of a compensable taking, "it is not literally accurate to say that [the property owners] have been denied all use" of their property rights.[40] Rather, as the discussion in this part has shown, "where an owner possesses a full 'bundle' of property rights, the destruction of the one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[41]

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[38] Tribe Memorandum at 11.

[39] See Arlen, "Window" Framing, American Film 13, 20 (May 1980).

[40] Penn Central Transportation Company v. City of New York, 438 U.S. at 137. (Emphasis in original.)

II. Proposed Exemption Would Not Constitute a Taking for a Private Purpose; the Determination of a Public Purpose Is In the Discretion of Congress.

A. There Are Substantial Public Benefits From VCR Usage and Dangers from Copyright Monopolies.

Professor Tribe asserts that the proposed exemption is "open to the serious charge that they take the property of copyrightholders for purely private reasons,"[42] citing "special benefits" for "foreign corporations" in support of this contention.[43] This assertion ignores completely the very real benefits of the proposed exemption to the American public and the role Congress plays in regulating copyright monopolies for the benefit of the public.

VCR usage expands the availability of a scarce resource -- the public air waves. Educational and public affairs programming, which is frequently relegated to less desirable time slots by television programmers, is made more readily available at convenient times through time-shifting. The broader dissemination of information for the benefit of viewers serves the fundamental purposes of both the copyright laws and the First Amendment.[44/] Contrary to Tribe's assertion,[45/] such use of VCR technology is productive in the same way that reading a book from the public library is. The VCR consumer is "borrowing" the program for a limited time, and information is thereby disseminated to more people.[46/] Contrary to Tribe's assertions that the

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[41] *Andrus v. Allard*, 444 U.S. at 65-66.

[42] Tribe Memorandum at 4.

[43] *Id*. at 5.

[44/] The Supreme Court has ruled in cases interpreting the copyright law and the First Amendment's applicability to broadcasting that the interest of the public in receiving information is paramount to the interests of either copyright holders or broadcasters. In Twentieth Century Music Corporation v. Aiken, 422 U.S. 151, 156 (1975), the Court recognized the preeminent interests of the public under the copyright law: "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . ." In Red Lion Broadcast Company v. Federal Communications Commission, 395 U.S. 367, 390 (1969), the Court emphasized that "it is the right of the viewers and listeners, not of the broadcasters, which is paramount."

[45/] Tribe Memorandum at 37.

[46/] The majority of consumers do not retain video cassettes for more than a brief period. Private librarying is not likely to be a major factor in the market because motion pictures taped from television are not the same as the uncut, uninterrupted movies that can be purchased, or rented, for nominal fees.

First Amendment may be endangered by the adoption of the proposed exemption,[47] the fact is that VCR usage enhances the exercise of First Amendment rights by expanding the availability of a scarce broadcast resource. Moreover, Tribe's assertion is directly contrary to the dangers stemming from copyright monopolies discussed below.

Tribe's concern about the benefits to private interests from the adoption of the proposed exemption fails to recognize that copyrights are monopolies established and regulated by Congress for the benefit of the public. As Professor Patterson has observed, "copyright statutes from the time of the Statute of Anne have been trade regulation statutes [and] . . . copyright law itself is a highly specialized law of unfair competition based on statutory grounds rather than common law."[48] Similarly, "the doctrine of fair use . . . [is] a doctrine judicially developed to mitigate the monopolistic effect of copyright."[49]

(Footnote Continued)

Moreover, the cost of blank tapes is such that there are inherent economic limitations on librarying.

[47] Tribe Memorandum at 47.

[48] 28 Vand. L. Rev. at 1194.

[49] *Id.* at 1198.

Tribe does not acknowledge in his Memorandum that copyright protection inherently involves a balancing of competing interests -- protection of the copyright holder's ability to control distribution of his work and wide dissemination of ideas to the general public. Tribe fails to recognize that excessive pursuit of the copyright holder's interests may severely hinder full and efficient dissemination of information to the public -- a fundamental goal of the copyright laws. Professor Patterson has cautioned that giving the owners of television facilities the power to use their free access to the public air waves together with "the power to avoid any accountability for the exercise of this power by enabling them to control subsequent public access to this material through the device of copyright . . . is to grant them an unnecessary power of censorship contrary to all traditions of the first amendment."[50] Such dangers apply as well to public policy that gives too much weight to the copyright holder's interests. Tribe's failure to acknowledge the damaging monopolistic potential of copyrights suggests a lack of understanding of one of the principal aspects of the copyright law -- to enhance First Amendments rights by promoting dissemination of information.

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[50] *Id.* at 1206-1207.

This danger of monopolistic abuses is also particularly acute where the holders of copyrights who are seeking to suppress programming alternatives also have an economic interest in competing technologies. In this case a substantial copyright holder, MCA, Inc., also has an interest in videodisc technology, which is unable to compete successfully on the open market with VCRs.[51]

B. Congress Has Broad Discretion to Determine the Public Purpose of a Governmental Action.

Tribe suggests in his Memorandum that Congress may be able to ensure that the proposed exemption would not be found unconstitutional as a private taking by providing compensation to copyright holders.[52] Tribe's suggestion implies that adoption of the exemption is constitutionally tenuous at best, when in fact the Supreme Court has stated explicitly that when Congress has spoken on the issue of the purpose of a taking, "the public interest has been declared in terms well-nigh conclusive."[53] Moreover, the "role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." [54] Indeed, the Supreme Court has refused the straight-jacket that Tribe seeks to have Congress don. He attempts to trivialize the proposed exemption by characterizing it as a dispute between competing private business interests and arguing that Congress cannot adopt legislation that would favor one businessman over another. Congress has broad discretion to define the public interest -- in this case the dissemination of information to more people and the greater availability of the public air waves -- even when the methods chosen for furthering the public interest might affect private business. The Supreme Court rejected Tribe's argument in a case in which it refused to enjoin condemnation of private property to make way for a privately financed redevelopment project. In so doing the Court rejected the contention that the project favored one group of businessmen over another:

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[51] *See* Tribe Memorandum at 15.

[52] *Id*. at 6.

[53] *Berman v. Parker*, 348 U.S. 26, 32 (1954).

[54] *Id*. Tribe concedes this point in his book, *American Constitutional Law* 458 n.10 (1978).

> "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."55/

Thus Congress has the authority to define a public purpose and

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55/ Berman v. Parker, 348 U.S. at 33.

the discretion to develop the means to further that purpose. It therefore has the authority to adopt the proposed exemption in service of the substantial public purposes discussed above.

III. Congress Has the Authority to Adopt Legislation That Serves Positive Public Purposes As Long as the Statute Is Reasonably Related to Congressional Purposes.

A. Positive Public Purposes May Be Served By Governmental Action That Affects Private Economic Interests.

Tribe contends that Congress may adopt legislation that has a substantial impact on private economic interests without compensation only to remove a public nuisance[56] or "in the most limited and extreme circumstances."[57] Professor Lawrence Berger has commented, however, that the Court is willing to approve regulations without compensation that have as their purpose "to secure some benefit for the community at the regulated party's expense."[58] The Supreme Court has recognized that a broad range of beneficial public purposes may justify noncompensable governmental actions that could result in substantial impacts on economic interests. For example, in rejecting the contention of property owners that the government only has the authority to prohibit "noxious" uses of property and not the authority to produce positive benefits from land regulation, the Court in a recent decision cited as precedents three cases that had prohibited "perfectly lawful uses" involving no adverse effects on the public. The Court explained that such cases "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."[59] Thus a public benefit can justify governmental action, just as a noxious use of property can, as long as the resulting impact on private economic interests is "reasonably related" to the implementation of the policy.[60]

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[56] Tribe Memorandum at 22.

[57] *Id.* at 28.

[58] Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. Rev. 165, 172-173 (1974).

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[59] Penn Central Transportation Company v. City of New York, 438 U.S. at 134 n.30.

[60] See Berman v. Parker, 348 U.S. at 33; Hadacheck v. Sebastian, 239 U.S. at 411.

B. Congress Has the Authority to Enact Legislation That Affects Private Economic Interests So Long as the Impact Bears a Reasonable Relationship to Implementation of the Public Policy.

As discussed above, the Supreme Court has recognized that governmental actions affecting private economic interests must bear a reasonable relationship to the interests affected. In a famous case the Court was asked to require just compensation for the action of a state official in ordering the removal of a large number of ornamental red cedar trees from property in the vicinity of apple orchards because the cedars carried a plant disease that destroyed apple trees but left the cedars unaffected. The Court upheld the state government's choice between the preservation of one class of property over the other on the ground that the state could reasonably conclude that the apple orchards were of greater value to the community. The Court stated: "For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process."[61] It has not been shown that the adoption of the proposed exemption by Congress will result in a substantial detrimental impact upon the economic interests of copyright holders. Even so, any impact on their interests, however small, will be reasonably related to the public purpose of enacting the exemption in order to enhance the availability of the air waves to the public for private, noncommercial purposes.

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[61] Miller v. Schoene, 276 U.S. 272, 280 (1928).

IV. Congress Has Ample Authority to Enact the Proposed Exemption.

Tribe contends that Congress has no authority to "clarify" existing law and may usurp judicial functions by adopting the exemption while related litigation is still pending in the courts.[62] Congress can, however, choose to call the proposed legislation a clarification of existing law. The Supreme Court has ruled that Congressional clarifications of law are entitled to "significant" weight in the construction of ambiguous statutes.[63] Of course Congress can also choose to reach the same result by amending the statute outright. Tribe questions such an approach only insofar as it resolves ongoing litigation.

In an early case the Supreme Court upheld Congressional legislation preserving a bridge that had been ordered destroyed by a lower court as an obstruction of navigation. It ruled that, while under most circumstances private rights that have passed into judgment cannot be altered by legislative action, those rights may be altered by Congressional actions that are for the benefit of the public at large, as defined by Congress. According to the Court, such public rights will be enforced by higher courts ruling on the case.[64] In a later case the Court stated that legislation may abate pending actions,[65] and the Court has interpreted intervening legislation to render cases moot.[66] Chief Justice Marshall observed more than a century and a half ago that if, "subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the [new] law must be obeyed . . . [even] where individual rights . . . are sacrificed for national purposes." U.S. v. Schooner Peggy, 1 Cranch 103, 110 (1801). Under this rule the courts have consistently applied the new statute to cases filed, and often decided, before the new law was enacted, even when application of the new law changed the outcome of the case.[67] There is therefore very little, if any, basis for questioning the Congress' authority to enact the proposed exemption at this time.[68]

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[62] Tribe Memorandum at 39 *et seq*.

[63] *Seatrain Shipbuilding Corporation v. Shell Oil Company*, 444 U.S. 572, 596 (1980); *Glidden Company v. Zdanok*, 370 U.S. 530, 541 (1962), *quoting Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1958).

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[64] Pennsylvania v. Wheeling and Belmont Bridge Company, 18 How. 421, 431 (1856).

[65] McCullough v. Virginia, 172 U.S. 102, 123-124 (1898).

[66] See, e.g., Hall v. Beals, 396 U.S. 45, 48 (1969).

[67] E.g., Carpenter v. Wabash Railway Company, 309 U.S. 23, 27-28 (1940).

V. Conclusion.

The legal analysis in Tribe's Memorandum is based upon inaccurate factual assumptions about the use of VCR technology and the effects of the proposed exemption upon copyright holders. Moreover, Tribe's discussions of the current state of the law of takings do not accurately reflect the reasoning of the Supreme Court in relevant cases. Adoption by Congress of the proposed exemption to the Copyright Act for private off-air recordings of television broadcasts would not violate the Fifth Amendment to the Constitution. As noted above, the Supreme Court has confirmed time and time again: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of the one 'strand' of the bundle is not a taking . . . ."[69] The proposed exemption would leave copyright holders with a large bundle of profitable economic rights and affirm the right of American consumers to enjoy in their homes the full benefits of programming disseminated over the public air waves.

Robert R. Bruce
Ricki Rhodarmer Tigert

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[68] Tribe's suggestion that Congressional enactment of the proposed exemption would confirm that the statute constitutes an unconstitutional taking for a private purpose has no basis in the law. Tribe Memorandum at 41-42.

[69] Andrus v. Allard, 444 U.S. at 65-66.

Senator **DeConcini**. Taking a movie that does get this three-stage payment, you are really suggesting that there be a fourth stage?

Mr. **Sheinberg**. No. We are certainly entitled to a fourth stage, but that is not really what we are suggesting. We are suggesting that if it is to be a compulsory license, it is going to have to compensate us for a deterioration in what is going to exist in the first three stages.

Senator **DeConcini**. What if there was no deterioration in one, two, and three stages? Would you still want the fourth stage?

Mr. **Sheinberg**. If there were no deterioration in any of the existing revenues that we have got, I think our emotional claim to your ear would be reduced significantly. I would still believe that you were tampering with something very, very important here, and that has to do with: Do you really want to allow, as part of American jurisprudence passed by Congress, the notion that here we are going to allow property to be taken "because it is going to be used for private use in a private home"? Maybe I am just conservative, but I think that is something I would not want to be in front of.

Senator **D'Amato**. With the chairman's indulgence, you say "property to be taken," property that was properly compensated for that came into my house. Now the question is: Does American jurisprudence say that once it comes into my house I should be precluded from having a device that would make it recordable so that I could use it again?

Mr. **Sheinberg**. What if a book comes into your house?

Senator **D'Amato**. If a book comes into my house, I can certainly, if I have some device, record it for my own use.

Mr. **Sheinberg**. No, sir.

Senator **D'Amato**. I cannot go out and sell it, but I can certainly do it, and I would like to see someone stop it as a practical matter. We are talking practicalities here. Maybe we are talking of a new area of jurisprudence, but the fact of the matter is that this comes into the house, and the sound is recorded. Now you are saying, "You are taking my property right." I think that is why we are having the hearing.

Is that the taking of a property right that you should be compensated for once again? Maybe it is. Maybe 51 colleagues and so many hundred others, and maybe the President—you have a whole big procedure here to get a bill passed—will say that they believe that that is a property right that should once more be compensated for in terms of that recording, and that is why we have these hearings. I am not prepared to say. As a matter of fact, I lean very much in the other direction, but I still take into consideration some of those questions you have raised.

You know, you say we kind of stand accused of rushing to judgment here. That is a new popular term. I am going to use it from now on—rushing to judgment. I do not know if possibly you are rushing to judgment, and I understand the industry's position in saying that these recorders are going to cause a diminution in terms of your sales, et cetera.

I think that story is out, and if there could be some manner by which we could give the proper redress to what we see as perhaps an infringement of people's rights, particularly those 3 million who have the recorders and maybe millions of others who want to buy recorders, and, by the same token, get that study underway, maybe all of our interests can be best served. Maybe we do get to be a little bit too emotional one way or another, instead of rushing to judgment on one side or the other.

I thank the chairman for his indulgence.

Senator DECONCINI. I thank the Senator from New York.

Mr. Sheinberg, I will just say this and then yield to Congressman Parris. We have 3 million American owners here, and the legality of what they are doing is in question. Although you indicate you are not going to enforce it, I daresay people change in companies, and groups and organizations change their views.

You are not prepared to substantiate any real damages. You are telling us that it could destroy your industry, and yet we do not have anything, and that may be the basis for a study. I am not sure that there is any way to find out what the economic loss has been to your industry, and the dilemma is still here.

What are we going to do when two courts seem to indicate that Congress should have acted? I happen to agree with both those courts who indicated that, even though I disagreed with the ninth circuit's decision.

We are left here with the dilemma of, "Well, let's study it again," or maybe Senator Mathias will offer some amendment that we can all rally around, but it is a little difficult when you are having public hearings to secure that information for the purpose of the record, so that all Senators could have that available to make some kind of judgment.

Mr. SHEINBERG. Senator, I do not like the record to show that somehow or other I was dilatory in not coming up with a recommendation. Mr. Jack Valenti was scheduled to testify here today. He is ill. I had approximately 1 day's notice to get from San Francisco here. I do not think it is unreasonable that I do not come with a proposed bill to you.

On the question you made on these 3 million Americans that seems to trouble you a great deal because they are doing something in the privacy of their homes, I cannot seem to dissuade you that we are not going to do something about it, because you seem to think that we might.

An analogy comes to mind. I do not know how many Americans there are in the United States who are smoking marihuana in the privacy of their homes. I have not heard any responsible person yet advocate that we should pass some type of omnibus Federal legislation that we do not want all these people being perceived of as petty criminals.

Senator D'AMATO. They say that in my State all the time.

Mr. SHEINBERG. The thing that concerns me is this. I understand and sympathize with your concern for those 3 million Americans. Understand our concern for all the people we have got who are working in our industry, who have worked for all these years. We are entitled to some concern too.

Senator DECONCINI. Congressman Parris.

Mr. PARRIS. Thank you, Mr. Chairman.

I would like to pursue that just a little bit, Mr. Sheinberg. It is my understanding that in the case of a network telecast of a TV program the viewer is paying for the first viewing by watching the commercial messages that are included in that broadcast.

You have indicated in your comments earlier that you would be considerably less concerned about this legislation if we could insure that the people who tape it and watch it individually would watch those commercials, but you would not have us pass a law that makes it contrary to the law for Americans to go to the bathroom during commercial breaks?

Mr. SHEINBERG. No; I surely would not.

Mr. PARRIS. Would that not be exactly the same effect as using the fast-forward?

Mr. SHEINBERG. No.

Mr. PARRIS. Why not?

Mr. SHEINBERG. Because Americans do not traditionally go to the bathroom six times an hour. [Laughter.]

Mr. PARRIS. Well, you are talking to an American who goes to the refrigerator for a beer, comes back for a sandwich, goes to the bathroom, and does three other things six times per hour, or whatever, at every opportunity.

I do not see any difference between that and watching that on tape, and I do not really do that with my recorder; I sit there, and I watch it. And I think I am one of the 16 percent—and I would refute your numbers. I have no basis on which to do that. I just do not believe those numbers. I do not think that is what happens in the real world.

We are not going to solve that problem. Let me just ask this. I think I am reliably informed that in the area of movies the Disney people have found a way to beat the VCR problem without using the royalty system. I am told that they simply refuse to allow some of their most valuable movies to be shown in their entirety on home television. You cannot tape something which is not shown. Is that not true?

Mr. SHEINBERG. Yes; but I am not sure where that leads. Where does that lead? We should not allow any of our things to go on television, so they cannot be taped? That is a harsh remedy.

Mr. PARRIS. One of the plaintiffs in this suit has found a solution to their problem, contrary to the one you suggest.

Mr. SHEINBERG. No; you are in error. Disney, who is the coplaintiff in this suit, stands totally joined with us in the conviction that if there is to be a remedy, it has to be a remedy that is going to compensate the copyright owners.

It is true that they have not put a certain limited number of their films—it is a very limited number—on television. Whether or not they have not done so because of this problem or whether or not they have not done so because of the unique characteristics of the Disney product and its appeal to children who keep coming along, I do not know the answer to, but there is no schism between us and Disney, I do not believe, on this issue.

Mr. PARRIS. I have just one more question, Mr. Chairman, with your indulgence.

I think it was faulty reasoning that led us to this position in the first place. Let me pursue, if I might, Senator D'Amato's question and your question about the book.

I have a book that I think is really super. I have already acquired a copy of it. I have paid for it, presumably. I have read it, and I like it very much. I can take that book and copy it on my typewriter. There is a law existing now—the copyright protection law—that prohibits me from distributing that typed copy of that book for any other purpose. OK?

What we are doing this time is extending the copyright protection into the home under this principle, under the decision we are now addressing our attention to. The manufacturer of my typewriter would have to pay a royalty in some way to the person who wrote that book. That is what you are really suggesting.

Mr. Sheinberg. May I comment on that? I think it is a good question.

Mr. Parris. Sure.

Mr. Sheinberg. People do not sell typewriters primarily for the purpose of having them type copies of books. By the way, I am not sure you can legally do that, but I do not want to get into that conversation.

Mr. Parris. Can or cannot?

Mr. Sheinberg. I do not think you can. I think, strictly speaking, that may be a violation of copyright.

Mr. Parris. Just to type a copy of a book is a violation of copyright?

Mr. Sheinberg. Yes; Congressman. I think it might be.

Mr. Parris. I suggest that it is not, but in any event——

Mr. Sheinberg. Whatever we each suggest—and I do not know what is the case—the point I am trying to make is this——

Mr. Parris. We will let the court decide.

Mr. Sheinberg. Yes; it is another case.

The point I want to make is this: These people who are selling these machines are selling them primarily for the purpose of inducing people to time shift copyrighted material. People who sell typewriters are not selling them primarily for the purpose of getting people to type copyrighted material.

Mr. Parris. But my point, Mr. Sheinberg, is that you would have me, as the manufacturer of that typewriter, pay a royalty to somebody because I might use that typewriter to copy a book.

Mr. Sheinberg. No.

Mr. Parris. I think that is a drastic and serious extension of the copyright laws.

Mr. Sheinberg. Not only would I not do so, but I would think that if the Congress decided to create what amounts to a compulsory license with a fee, you could provide adequate remedy so that a certain percentage of the machines and/or tapes which were going to be dedicated to uses other than copying—primarily copying off the air—could be exempted from payments. That problem can be attended to. It is a difficult problem, and I do not underestimate the difficulty, but as the ninth circuit said, by analogy, just because it is a difficult problem, I would at least hope you do not get to the conclusion that there should be no compensation.

Mr. Parris. Mr. Sheinberg, we are going to be a great deal older than we are today before we come to some solution where the administration of a system will pay an author of a book x dollars, x cents, or whatever, a guy who makes a record x percent, a guy who makes a movie *y* percent. Can you imagine the incredible administration of a program of that kind? I am not even sure it is possible in the real world.

To hold this legislation to correct the situation that we have all addressed ourselves to today, I think, creates great consumer problems that will not go away.

Look at the testimony of these gentlemen who have talked about the sales of these units. There is a reason, and the reason is that the American consumer wants them. If they want them, they are going to get them, whether they are made by Sony, by GE, or by whoever; it is not important. They will be a fact of life in this Nation.

Mr. **Sheinberg**. There is an old saying that I learned when I came from Texas, and it comes in many forms, but the basic saying is, "There's no such thing as a free lunch." If you give all these consumers who want this product this product, it will not be free. Something will happen. Whether that something that happens is that motion picture and television production in the United States deterioriates—I do not know what the result will be, but there is no free lunch here.

Mr. **Parris**. Could not the solution be a revamping, a change, a differentiation of some kind of the system that you now use in a profit establishment of the creation of your product in the first place? Is that possible?

Mr. **Sheinberg**. No; I have been thinking about this for 6 years, and regrettably, I think that once you cross that bridge and say, "We are going to give the consumer what amounts to a compulsory license," the only remedy that my limited imagination has come up with is that they are going to have to affix some kind of fee to machines and/or to tapes and dedicate to somebody the responsibility, analagous to the Copyright Royalty Tribunal, of distributing it to those people who are injured and who are deserving of it.

Mr. **Parris**. Nobody wants to injure anybody, Mr. Sheinberg. You come from Texas; I am from Virginia. There is an old saying, "You don't throw out the baby with the bath water." We have a problem here, and I think Congress needs to address it.

Thank you very much, Mr. Chairman.

Senator **DeConcini**. Thank you.

Senator D'Amato, do you have any further questions?

Senator **D'Amato**. No, thank you, Mr. Chairman.

Senator **DeConcini**. Mr. Sheinberg and Mr. Williams, thank you for your testimony today.

Senator **DeConcini**. The hearing will conclude for the time being, subject to the Chair's desire.

[Whereupon, at 5:45 p.m., the hearing was recessed, subject to the call of the Chair.]

[Prepared statement of Mr. Williams follows:]

STATEMENT BY
W.G. WILLIAMS
INDEPENDENT MEDIA PRODUCERS ASSOCIATION

The members of the INDEPENDENT MEDIA PRODUCERS ASSOCIATION, a nationwide organization of producers of motion pictures and videotapes, have a great interest in the outcome of the debate over the future legality of the off-air videotaping of broadcast materials. The recent decision in UNIVERSAL CITY STUDIOS v. SONY CORPORATION OF AMERICA indicated that recording copyrighted material off-air on home video recorders is now a violation of the Copyright Act of 1976.

On the one hand, the convenience of being able to videotape an interesting television program for later home viewing is something we have often taken advantage of ourselves. On the other hand, this very convenience makes us, as producers of copyrighted materials, open to considerable financial loss as unscrupulous individuals and organizations make and distribute unauthorized copies of those videotapes to avoid legitimate royalty payments to the producers or authorized distributors.

Senate Bill 1758, which we understand was introduced in response to the UNIVERSAL v. SONY decision with the intent of legalizing home video recording of off-air material, unfortunately is much broader than necessary to achieve that goal. The bill gives a tremendous foot in the door to those who would make unauthorized copies of all types of video and motion picture programming -- broadcast or not. In fact, the words "broadcast" and "television" do not even appear in the bill!

The apparent intent of the bill is definitely worthwhile: to allow American citizens the right to this technological convenience. But this must be done without disallowing the copyright holders a fair return on their investment. If the profit incentive is removed or significantly reduced for the producers, all those who enjoy films and television programs will suffer because independent producers will either turn their attentions to other endeavors or will produce material that will be specifically excluded from any market that cannot be tightly controlled.

The members of I-M-P-A, with a few exceptions, are not the large studios or corporations that have tremendous resources to fall back upon. Rather, most are independent entrepreneurs or small businesses that produce programs for training and education as well as entertainment.

Often these programs are produced spontaneously in the hopes of recouping the costs through future sales. Therefore, the making of any unauthorized duplicates of these programs represents a significant financial loss to producers. Although this has been the case for some time, the passage of S.1758 in its present form will only exacerbate the situation.

As a result, a major concern of our organization is that the passage of this bill, as written, could be construed by the general public to be a wide opening of the door to unauthorized duplication. The bill, as written, states that it "is not an infringement of copyright for an individual to record copyrighted works on a video recorder if (1) the recording is made for private use; and (2) the recording is not used in a commercial nature."

Let me illustrate our concerns with this wording:

Does S.1758 mean that an individual may order a preview copy of any kind of film or videotape or obtain such a program on approval from an authorized distributor, make his or her own copy of that program, and return the original material to the distributor without a purchase? S.1758 seems to give away the store!

It would also seem that the current wording of the bill would allow anyone to copy any program obtained from any source and not be in violation of the Copyright Act as long as it is for private use and not used in a commercial nature. Under S.1758 it would seem that the copyright holder would have no recourse...and would make very few sales.

Furthermore, what constitutes use "in a commercial nature?" In the vernacular, "commercial" use would probably mean that someone had received money for the use. Could this then be construed to mean that an individual could make 40 copies of an educational program and give those copies to teachers in a private school system. Since no money has changed hands...certainly not going into the hands of the producer...this might be interpreted as not being a use of a commercial nature.

An independent producer of motion pictures or television programming would seem to have little hope of ever making a return on his or her investment as a result of this apparent abrogation of his or her copyright. If the wording of the bill were sufficiently narrow as to be limited to that material which could be obtained off-air from open-circuit broadcasting or cable television where the producers have theoretically been already reimbursed for their efforts, it would be bad enough; but the wording of the bill is so loose as to endanger the copyright protection of ALL video material!

Indeed, the wording of S.1758 seems to enable a person to bypass all vestiges of legitimate commerce in the video programming marketplace!

With the passage of S.1758 in its present form, the holder of copyrights on video material would have little hope of ever making a return on a speculative investment...and might well decide that plumbing or carpentry would be a more profitable profession. That may well prove to be the case! The end result would be a reduction in the amount of future programming since there will be little chance of paying the developmental costs of any programs not having a prior guarantee of network or theatrical play. This would seem to be to the detriment of the very people that this bill is intended to benefit.

Currently, this unauthorized duplication of materials is frequently referred to as piracy and, if you are a producer, the term is apt! The Federal Bureau of Investigation has been making considerable strides recently in developing ways of determining whether the production of specific motion picture prints and videotapes has been done with the consent of the copyright holder. It is also I-M-P-A's concern that the passage of this bill as written will make it more difficult for the F-B-I's anti-piracy unit to continue this work. This bill might also make it more difficult to obtain convictions of those few who cause a significant loss to the entire industry through their wholesale production of pirated copies of programs.

While a variety of solutions have been suggested which should definitely be considered by this Committee, I-M-P-A would like to make the recommendation that changing the wording of the bill could go a long way toward addressing many of our organization's concerns.

First, we feel that the wording should be:

> "Not withstanding the provisions of section 106, it is not an infringement of copyright for an individual to record on a video recorder for private use in the home, television signals transmitted through the air or through cable into the home, provided:
> (1) that no additional copies be made or be allowed to be made; and
> (2) that there be no commercial use of any recordings made under this section."

This wording would address the specific situation that inspired the bill and would allow individuals the full use of their recording equipment to enjoy television programming at their leisure. This wording would also provide a measure of protection to the copyright holders of the broadcast material. Finally, the wording would provide additional protection to the producers of copyrighted educational materials which are rarely broadcast into the home but are often telecast over closed-circuit or I-T-F-S systems into classrooms.

Additionally, we feel that the bill should be expanded to stipulate that it does not authorize any further duplication of any videotapes recorded under its provisions; does not authorize reproduction of any copyrighted materials not telecast into the home; and that any such duplications without the express consent of the copyright holder constitutes a violation of copyright.

To conclude, the INDEPENDENT MEDIA PRODUCERS ASSOCIATION agrees that individuals should be allowed to enjoy television in their home on their own schedule. This means that off-air video recording of television programs for private use should not be illegal.

However, in correcting the apparent oversight in the Copyright Act brought to light by the UNIVERSAL v. SONY decision, the Congress should not pass legislation that would be so broad as to deny copyright protection to the producers. We feel that S.1758 in its present form does just that!

We respectfully urge that this Committee study ways to revise the language of the bill so that the rights of the few will not be annulled in the haste to re-establish the rights of the many.

# # #

APPENDIX A

Testimony of
Joseph A. Lagore
President, SONY Consumer Products Company

Mr. Chairman:

My name is Joseph A. Lagore. I am the President of SONY Consumer Products Company, a division of SONY Corporation of America. I have been with SONY for eight years and have worked in the consumer electronics industry for more than 20 years. With SONY, my chief responsibility deals with their consumer video and audio marketing.

SONY is very pleased to have this chance to testify here before the U.S. Senate Judiciary Committee. The proposed legislation you are considering is, in our opinion, of importance not only to the electronics industry and to the movie industry -- it especially deals with important and legitimate concerns directly impacting on the American public as consumers, small businessmen, craftsmen and factory workers, advertisers, and broadcasters.

Additionally, the controversy that provides the basis for this proposed legislation and these hearings raises questions affecting the privacy of all citizens of this country.

BACKGROUND

Before I specifically get into any of those points, though, I think it is worthwhile to provide you with some background on SONY Corporation of America, its development of the home video recorder and also on the history of the current legal problem which has prompted this proposed legislation.

SONY CORPORATION OF AMERICA

SONY Corporation of America is 21 years old. Begun in 1960, we employ nearly 6,000 working men and women at more than 30 facilities in 17 states. Our two major plants: a color television manufacturing plant begun in 1972 at San Diego, California employs 1,800 people and a magnetic tape manufacturing plant -- one of the largest in the world -- at Dothan, Alabama employs an additional 1,800 people, while a smaller plant operates at Delano, Pennsylvania. A second major color television facility is being established in the Eastern United States.

It should be noted that 75 percent of all SONY color televisions sold in the U.S. are manufactured here. All told, in addition to our sales here in America, our facilities also export in excess of $120 million of American-made SONY products overseas.

SONY prides itself on its expertise in electronics technology, and we strive to creatively provide new products that will enhance the lives of consumers.

We have always sought to give the American public electronic products of the highest quality. A few of our best-known products have been:

- Transistor radios
- Trinitron color televisions
- U-matic video tape recorders
- Audio cassette recorders
- Betamax home video cassette recorders
- WALKMAN personal portable stereos and hi-fi components

THE DEVELOPMENT OF BETAMAX

This proposed legislation deals with home video recording off the public airwaves using a product SONY has developed called a home video cassette recorder (VCR). SONY's entry in this VCR market is known as the Betamax.

The development of this product began with SONY's introduction in 1965 of the first home video recorder, the TCV 2010.

It was a reel-to-reel machine that employed 1/2-inch tape and recorded in black and white. This was the first step toward the current Betamax home unit we sell.

In 1969, SONY created for home use a 3/4-inch cassette color recorder called the U-matic, which also enjoyed much success in commercial use and became the accepted standard for broadcasting and industrial communications. It was an important step in the development of the home Betamax.

As the evolution of this video technology continued, in 1975 SONY introduced the first Betamax home video recorders in this country. The basic function of today's machine is essentially the same as it was in 1965.

HISTORY OF LEGAL CONTROVERSY

The need for the legislation before us today is rooted in a recent court ruling of the 9th Circuit Court of Appeals in California, a ruling I will return to discuss later. But I think it's important before I get into the specifics of that ruling, resulting from a suit brought by Universal Pictures and Walt Disney Productions against SONY and several other defendants, that I acquaint you with some other aspects of the legal controversy.

As you can see from the chronology I have just provided on the development of the Betamax, this technology and unit did not just spring up over night. Years of research and development and several stages of introduction for the earlier phases of home VCRs preceded the product known as Betamax introduced in 1975.

None of this was done in a vacuum or in a low-key fashion. Nor was it done without the full knowledge, and at times -- in our opinion -- the encouragement of the very same parties in the movie industry that eventually brought suit.

For instance, when the TCV 2010 was introduced in 1965, SONY, in keeping with its practices, held a demonstration for various interested parties. Among those in attendance were executives of Universal City Studios and one of them, Marshall Wortman, Wrote a follow-up memorandum offering his impressions of the unit. (Appendix A).

After a description of the recorder, Mr. Wortman noted in his comments, and I quote: "Any TV programs (including filmed shows) may be recorded for black and white playback...Deciding what is worth preserving is an individual problem. Would probably be confined to some special events for libraries, i.e., space flights, sports, government hearings...presently a prestige home item." End of quote.

That memo dealt with many questions and a copy is attached to my statement, for the committee's review. At no point, however, did this memo raise any copyright question.

Charles Levy of Walt Disney Productions also attended a demonstration of the TCV 2010. A memo he wrote to Mr. Walt Disney, passing on some of the descriptive literature we provided, is also attached. As you will note, Mr. Levy concludes, "I saw a demonstration and was very much impressed." (Appendix B).

In other words, the movie industry was very well aware of what we were developing from the times we first demonstrated and marketed video recorders in America.

Their view of our progress through all of this was probably best summarized in a letter from MCA, Inc. executive Berle Adams, to Mr. Akio Morita of SONY. With respect to the demonstration of U-matic in 1969, Mr. Adams wrote: "It sounds like an exciting breakthrough for both the motion picture and television industry. May I wish you success." (Appendix C).

Perhaps the best illustration of the excitement and interest of the broadcasting and movie industries in this new technology came after the introduction of the U-matic machines in 1971, when the National Academy of Television Arts and Sciences awarded SONY an Emmy, its highest accolade, in recognition of how this machine revolutionized the broadcasting and industrial communications fields.

Again, later, in 1975, after SONY introduced the very Betamax VCR which became the subject of Universal's lawsuit in the Ninth Circuit, an officer of Universal, Mr. Taft Schreiber, communicated to one of SONY's distributors: "Certainly there is a market for Betamax. I hope that it contributes importantly to your earnings..." (Appendix D).

I have recounted this 10-year history of the development of this product to show you that it was well-known, widely publicized and highly advertised, as well as being very much utilized by the entertainment and broadcasting industry.

Therefore, you can imagine how shocked and surprised SONY was in 1976 to be named as a co-defendant in the lawsuit by Universal and Walt Disney Productions, which sought to prevent the sale of home video recorders which record off the air.

The first court ruling on that case sided with us and with the public. Judge Warren J. Ferguson, of the U.S. District Court, issued an opinion stating that home taping for home viewing was all right; that the legislative history of the copyright law authorized this as fair use and made clear this area was not something for which copyright holders would be envisioned to be able to seek compensation; and even if some home recording were an infringement, SONY was not a contributor thereto because the homeowner does the taping and no manufacturer or distributor has that kind of control over the use of the product. (Appendix E).

An appeal was filed and last month the 9th Circuit Court of Appeals in California contrastingly found that all home video recording was indeed copyright infringement and that

SONY is liable for all of it. Rather than recount the arguments and judgements in these two decisions, I have attached the ruling, and other necessary documents as exhibits with this testimony. (Appendix F).

THE PROBLEM

If this ruling stands, not only is the video industry affected, it would also have wide implications for the audio, publishing and reprography industries.

I feel the paramount concerns are these:

One: The ruling intrudes on the privacy of the American citizen to do what he wants to do in his own home. Note the hundreds of editorials, columns, cartoons and other media comment supportive of the consumers' position in this matter -- most of it emphasizing this important aspect. (Appendix G).

Maintaining such ridiculed laws fosters disrespect for all laws. It also inhibits parents teaching their children proper regard for the law. As news and talk shows expose children to the current illegality of videotaping, how is a parent to condone his child taping Mr. Rogers Neighborhood or Sesame Street without creating a conflict in the child's mind about selective adherence to laws?

Two: What we are talking about here is videotaping for private, non-commercial use of programming broadcast over public airwaves. There are more than 1,000 publicly-licensed television stations in existence today, and in excess of 1,500 more planned for the immediate future by federal law. These stations are supposed to serve "the public interest, convenience and necessity," and their broadcasts are "for the use of the general public." Why should what is broadcast over these airwaves be available to consumers only at the time that the networks or the creators of these programs deem fit? Why shouldn't those who work either during the day or at night during prime-time be afforded the freedom to tape programming of their choice for viewing at another time?

Survey data shows that the majority of people who own a Betamax use it primarily for this "time-shifting" capability. For many, time-shifting is not a matter of convenience; it is the only way for them to see programming. Also, shouldn't parents be able to use time-shifting as a way to show their children educational shows they might miss while at school, or other informational programs that might air too late at night for children to watch?

These television stations are not licensed in order to make money for movie companies or other production facilities. They serve a public need for information, education and entertainment. They accomplish that goal over public airwaves. Time-shifting grants viewers the most freedom to fully avail themselves of programming that is offered.

Three: We should not lose sight of the fact that many copyright holders -- among them The National Football League, National Collegiate Athletic Association, Major League Baseball, National Hockey League, National Basketball Association, educational, religious and other informational producers -- have all testified in court that they have no objection to consumers privately recording their presentations for home use.

In fact, no one else in the entire movie industry or among any of the other television and film production companies has been concerned enough to bring this suit but Universal and Walt Disney Productions. And Disney Productions has dropped out of a subsequent suit against more than 42 VCR manufacturers, distributors, advertisers and other interested parties -- a suit currently being pursued by Universal alone. (Appendix H: Disney now only seeks legislation to assure that home recordings not be disseminated or distributed "beyond use in the home where it was recorded.")

Four: Moreover, because of these rulings and suits, this legislation is needed to clarify the current situation for the electronics industry, the thousands of small businesses that sell VCRs, the people who manufacture the tapes and -- especially -- the current owners and potential buyers of VCRs.

We're talking about a product that contributes an estimated $3 billion to the American economy. It allows viewers to record educational, informational and religious programs. With the addition of a portable camera, it enables consumers to make home movies. In short, it enriches the quality of life for many millions of Americans -- and that number is rapidly growing.

Five: Allowing the current legal ruling to stand without needed clarification means that consumers who own or use VCR equipment are considered as law breakers and could conceivably be subject to the recall of their machines.

While Universal in their public statements to the media has expressed no interest in harassing consumers, confiscating their equipment or banning further sales, they have, in actuality, demanded in their legal documents to the courts an injunction against further sale of new machines and even asked for a recall of all the machines already sold to consumers. (Appendix I).

Six: To ban this equipment would surely have a dangerously negative impact on technological innovation and development of any kind in this country. Why would someone spend the billions of dollars needed to create new technology in the fashion we have here only to have it banned or recalled a decade and a half after the initial development began?

THE SOLUTION

S. 1758

We feel S. 1758 rectifies these problems. As law it would:

- Take the government out of consumers' living rooms regarding video habits. Maintain the right to privacy.
- Aim at removing about 3 million current home videorecorder owners, in excess of 10 million users, next year an estimated additional 2.5 million expected purchasers and progressively more in the future from any copyright law violation liability.
- Aid thousands of businesses which expect to sell 35 to 40 million blank and prerecorded cassette tapes next year alone.
- Keep thousands of Americans employed, generating millions of tax revenue dollars, and minimize damage across the spectrum of the nation's economy to affected production and distribution outlets.

Thank you for your generous time today. I think you sense how concerned we at SONY Corporation of America are about all the complex implications of this matter. We feel convinced we have a quality product that serves the interest of millions of consumers, broadens their freedom, grants them full use and enjoyment of the public airwaves -- and even our adversaries admit, has harmed no one and caused no one a loss of revenue.

We hope you will act favorably on this remedial legislation and act upon it expeditiously so that this serious but, in our opinion, quite needless problem may be resolved.

***

APPENDIX A

[illegible]
STUDIOS
UNIVERSAL CITY
CALIFORNIA

INTER-OFFICE COMMUNICATION

Misc. 1

Date June 17, 1965

Copies:
☐
☐
☐

To A. A. Dorskind
From Marshall Wortman
Subject SONY "VIDEOCORDER"

000151

I Attended the demonstration of the Sony Videocorder on June 15, 1965. Taft Schreiber and Berle Adams were also there.

Attached is a brochure which describes the equipment now available:

Retail prices -	TCV-2010	$ 995.00
	TCV-2020 walnut cabinet & Timing device	1250.00
	Camera	350.00
	Reel 60 min. tape	39.90
	Reel 30 min. tape	21.95

Any TV programs (including filmed shows) may be recorded for black and white playback. Clarity is good, sound satisfactory. There was no demonstration tape available to judge orchestral playback.

Tapes are erasable. There is a safety switch to prevent accidental erasure. Operation is very simple; anyone who can thread a common audio recorder and push a button can operate this equipment.

Merchandise program has not yet been established by Sony, according to their sales representative.

Comments:

1. Deciding what is worth preserving is an individual problem. Would probably be confined to some special events for libraries, i.e., space flights, sports, government hearings.
2. Largest market probably institutions, hospitals, schools, industrial plants.

UNIVERSAL v. SONY
Case No. 76 3520 F
Exhibit No. E
Date MAR 7 1979 Iden.
Date Evid.

3. Widespread use of video tape recorders in the home will create demand for pre-taped non-broadcast programs. (Form of Pay TV). The desired program could be bought off the shelf at the corner TV Tape store, as is now the case with phonograph records and audio tapes. Color problem would have to be solved, as would cost of equipment, recordings, distribution, etc.

4. Taft Schreiber indicated to Mr. Akio Morita that we would be interested in purchasing a unit including camera for experiment at the studio. He also invited Mr. Morita to visit here to further discuss library concept of pre-recorded programs. As you are aware, Sony now provides tapes of films to American Airlines for their in-flight projection.

5. Use of unit might be an idea for Tour Division, since camera is small and portable. Visitors could see themselves on monitor screen directly or by immediate playback. I suggested this to Berle Adams, who thought the idea had merit. (Possibility we tie in with Sony to use one as demonstration model?)

6. Five firms actively researching home video tape recorders are: North American Phillips (Norelco), Ampex, RCA, Sony, Matsushita. Probably won't be sold as a mass consumer item for the next five years. Presently a prestige "home" item.

APPENDIX B

DISNEY INFORMATION 050003

For

6-8-65

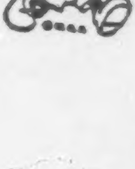
Dear Walt:

Thought you might be interested in attached.

I saw a demonstration and was very much impressed.

Regards,

Chollie



Charles Levy

H

UNIVERSAL v. SONY
Case No. 76 3520 F
Exhibit No. H
Date MAR 7 1979 Iden.
Date Evid.

SONY HOME VIDEOCORDER

The following questions and answers cover all basic details of SONY's home Videocorder:

I. THE VIDEOCORDER

1. What is the SONY home Videocorder?

A new home entertainment instrument designed to record television programs on tape for playback at any time. SONY has developed two versions of the home Videocorder; model TCV-2010 which is leatherette and portable and model TCV-2020 which is housed in a walnut cabinet.

Both units can also be used with SONY's video camera to record events in the home on tape. The camera equipment is covered later in this questionnaire.

2. Is operation of the home Videocorder difficult?

No. The operation is quite similar to that of ordinary tape recorders.

3. What are its special features?

The home Videocorder has many exciting features which are covered in this questionnaire. Perhaps the most special is the utilization of a slow speed recording system. This is a truly unique feature in a low priced, compact home-use video tape recorder.

4. Why is slow speed recording important?

It is actually the slow speed recording system which makes the home Videocorder possible and practical for home use. Due to this system:

Tape speed is only 7½ inches per second.

Tape is only ½ inch wide.

Uses only 7 inch reels for one full hour of continuous recording.

Tape consumption is low.

Tape breakage is minimal.

Mechanical durability is assured.

UNIVERSAL v. SONY
Case No. 76 3520 F
Exhibit No. I
Date MAR 7 1979 Iden.
Date ______ Evid.

5. Isn't a much faster speed necessary for a good signal?

Normally, yes. However, SONY has developed a special recording system which makes slow speed recording with all its attendant advantages possible.

6. What recording system is used in the home Videocorder?

   Basically, a rotary head system with helical scan. In addition, SONY has developed a special modification of this system.

7. What is the picture quality of recordings?

   Excellent. Recordings made with the home Videocorder are indistinguishable from the original broadcast.

8. What type of audio recording system is used?

   Exactly the same as an ordinary audio tape recorder.

9. Is the home Videocorder transistorized?

   Yes. Solid state circuitry throughout further assures mechanical durability.

10. Can the home Videocorder record color television signals?

    Yes. These will reproduce in black and white.

11. Can a program be watched without recording?

    Yes. The Videocorder screen will also function as a normal television receiver.

12. Is there a timing device on the home Videocorder?

    On model TCV-2020 there is a timer which can be preset to record a television program while the owner is away from home.

    Also, if two programs are broadcast simultaneously, one may be taped on the home Videocorder while the other is viewed on a second TV receiver.

13. What are the dimensions of the home Videocorder?

    Both units are comparable in size to a man's suitcase.

    TCV-2010: 11" High x 16¼" Deep x 27½" Wide.
    TCV-2020: 11 3/10" High x 16 3/4" Deep x 28 3/8" Wide.

14. What is the weight of the home Videocorder?

    TCV-2010: 66 pounds (has carrying handles for portability)
    TCV-2020: 70 pounds

15. What standard accessories are available?

    They include one reel of tape for 15 minutes recording, one empty reel, an earphone. an external antenna connector and a head cleaner set.

II. TECHNICAL INFORMATION

1. What is the number of recording heads?

   Two.

2. What is the head speed?

   Thirty revolutions per second.

3. What is the head life?

   1,000 hours.

4. Can the head be replaced?

   Yes. The low priced head can be replaced as easily as changing the cartridge on a phonograph.

5. How does the level meter work on the home Videocorder?

   In the same manner as the level meter on an ordinary audio tape recorder. This meter indicates the proper recording level for both video and audio and may be precisely adjusted.

6. What is the resolution?

   180 lines per inch.

7. What type of sync signal is acceptable?

   Negative.

8. How many motors are used?

   One.

9. What are the power requirements?

   The home Videocorder operates on normal AC current.

10. What is the power consumption?

    103 watts.

III. TAPE

1. What type of tape does the home Videocorder use?

   Magnetic recording tape. SONY manufactures its own high quali- one-half inch tape for use in the home Videocorder.

2. Can tapes be spliced and edited?

   Yes.

3. Can tapes be erased?

   Yes.

4. How long can tapes be stored?

   The same length of time as ordinary audio tape.

5. How many times can one SONY tape be used in the home Videocorder?

   The same length of time as ordinary audio tape.

6. How fast is the rewind?

   Approximately 6 minutes.

7. Can the picture be stopped or run in slow motion?

   Not on these models as they are specially designed for low priced home use. SONY's industrial video tape recorders do have such a feature.

IV. SERVICE AND WARRANTY

1. What about home maintenance of the home Videocorder?

   Maintenance in the home is simple; quite similar to that of ordinary tape recorders.

2. Is there a warranty?

   Yes. SONY warranties the home Videocorder for one full year on both parts and labor.

3. Is service available?

   Yes. SONY's basic service policy remains unchanged --- be service ready before going to market.

V. VIDEO CAMERA KIT

1. What is the Video Camera Kit?

   SONY has developed a Video Camera Kit which includes the video camera with F 1.9 lens using a C mount, tripod, dynamic microphone with uni-directional pattern, camera cable, AC extension cord and microphone extension cord.

2. How about lens interchangeability?

   Both telephoto and wide angle lenses can be adapted to SONY's camera.

3. How much light does the camera require?

   For proper recording, 100 lux or more. Actually, no more light than is necessary for a home move camera.

4. What is the weight of the camera?

   5.9 pounds.

5. What is the length of the camera cable?

   16.5 feet.

6. What is the length of the microphone cable?

   16.5 feet.

7. What is the length of the AC cord?

   10 feet.

8. Is the camera transistorized?

   Yes.

9. What are the dimensions of the Video Camera Kit?

   4 7/8" High x 11 3/8" Deep x 24 3/8" Wide.

10. What is the weight of the Video Camera Kit?

    20 pounds.

VI. PRODUCTION INFORMATION

1. Where is the home Videocorder manufactured?

   For the most part in Tokyo, although the wooden cabinet is manufactured in the United States. Plans are being made to establish assembly centers in other parts of the world.

2. What is the initial production quantity?

   SONY now has all facilities needed for mass production. Therefore, any marketing demands will be met. Several thousand home Videocorders will be delivered to the United States in the near future.

3. What are the projected production plans?

   SONY's production targets for the home Videocorder, a home entertainment instrument, are the same as those for transistor radios and televisions. Therefore, any production quantity required will be met.

4. Will the price be lowered eventually?

   Already the price is amazingly low. Although SONY hopes to reduce this price eventually, such reduction will not occur in the near future.

5. Will future home Videocorders use the same recording system?

   SONY strongly believes that its newly developed recording system will become the standard for all future home video tape recorders.

6. Will the home Videocorder ever be produced as a console?

   Yes. In a relatively short time, SONY will market an entire line of home Videocorders from portable types to larger console versions.

7. What is the production quantity of video tape?

   Since SONY has one of the world's largest factories for the manufacture of both video and audio tape, any tape requirement arising through marketing of the home Videocorder can be met.

8. Will SONY produce and supply pre-recorded tapes?

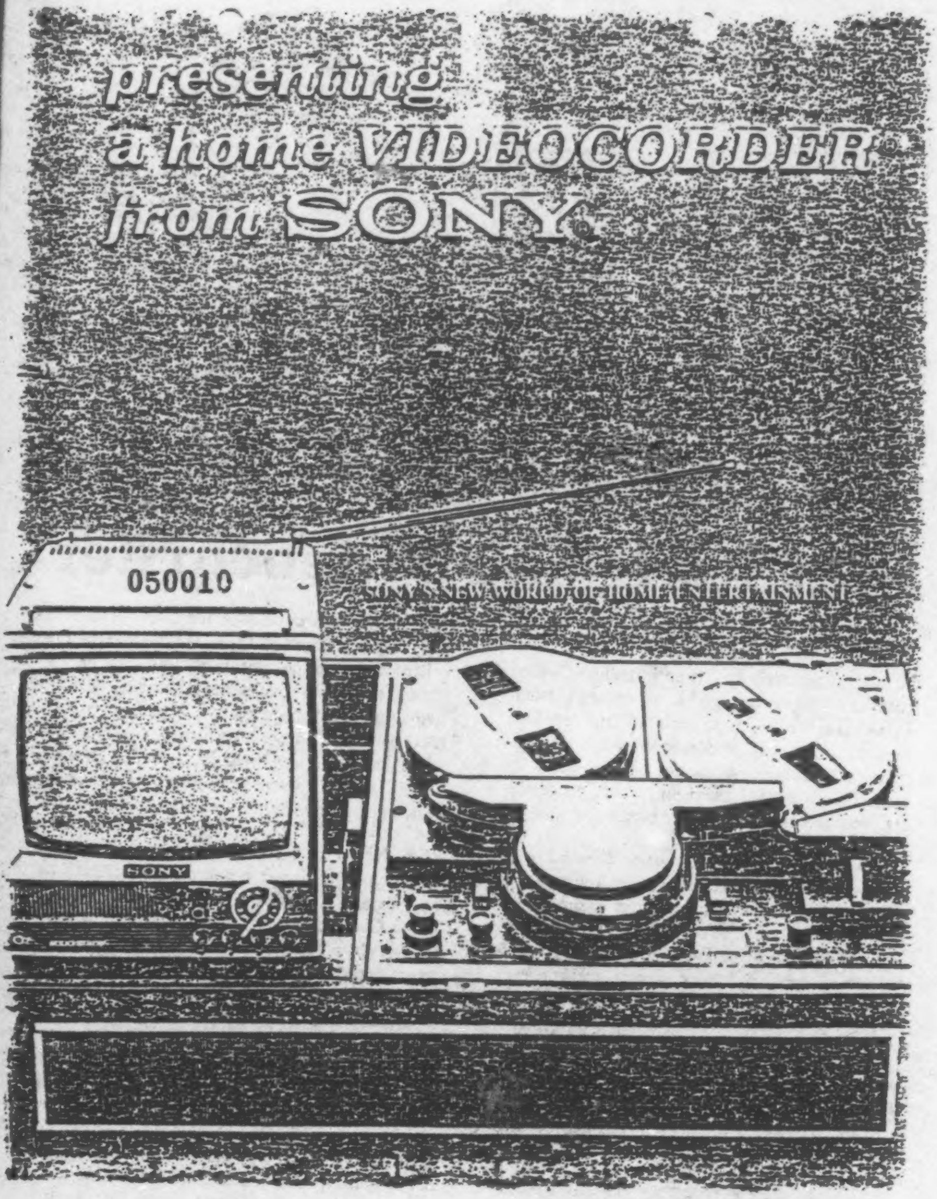
   This possibility is now being studied by SONY. Of course, SONY plans to meet market demands created by this uniquely new instrument.

VII. PRICING INFORMATION

1. What are the prices?

   SONY's initial consumer pricing structure is as follows:

TCV-2010	$995.00
TCV-2020	$1250.00
VCK-2000 Camera Kit	$350.00
V-31 Tape (30 min.)	$21.95
V-32 Tape (60 min.)	$39.95
RH-7V (empty reel)	$2.95



presenting
a home VIDEOCORDER
from SONY

SONY'S NEW WORLD OF HOME ENTERTAINMENT

050010
SONY

Important programs may be seen time and time again.

SONY's Home Videocorder

What is a Videocorder?

A "video tape recorder" is an instrument which records both picture and sound on tape, much in the same manner as an ordinary tape recorder records sound only. Professional video tape recorders have been in use for several years in many fields, notably television, where programs are recorded on tape for later broadcasting.

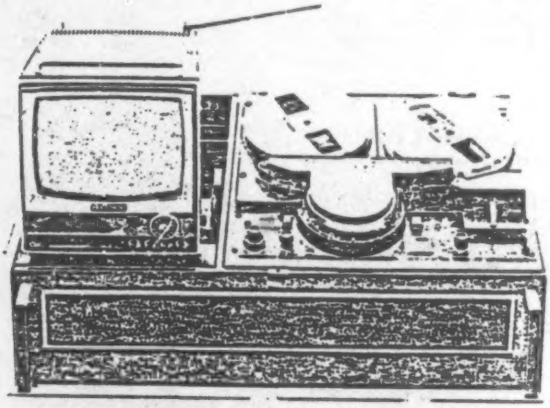
Today, SONY takes a giant stride forward with a low priced home video tape recorder, called the SONY Videocorder. Its operation is similar to that of an ordinary tape recorder. With the flip of a switch, the owner may either transcribe a television program on tape for later viewing or playback a recorded tape. By the use of the Videocorder, important programs can be recorded on tape in the owner's absence. Also, if two important programs are broadcast simultaneously, one may be taped on the Videocorder while the other is viewed on a second TV receiver. In fact, a *home tape library* may be built of news, sports or dramatic television programs.

Family events may be recorded on tape.

With the use of SONY'S Video Camera Kit, a new era of enriched home entertainment has truly begun. Using the simple-to-operate SONY Video Camera and Microphone, anyone may easily record family events, or even their own sports activities for study and improvement. It is easy to see the tremendous advantages of video tape recording. Any recording may be viewed immediately with no tiresome waiting for developing or processing. These home video recordings may be included in the home tape library.

SONY's home use Videocorder, the newest major breakthrough in magnetic recording techniques, compact in size and low in cost, makes it possible for many people to enjoy the excitement of video recording in their own home!

Video Tape Recording—SONY's N



TCV-2010

TCV-2020

It is easy to see that SONY'S home Videocorder and Video Camera K
when used together, truly open the door to an exciting
new world and era of home entertainment!

w World of Home Entertainment

Illustrated is the world's newest home entertainment equipment, SONY'S home Videocorder. The unit is designed to record telecasts in black and white with sound for showing whenever desired.

FEATURES: Videocorder TCV-2010

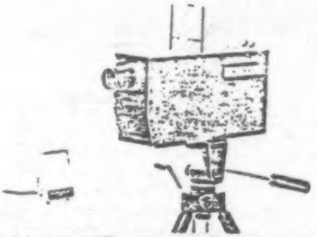
- **Simple operation, similar to ordinary tape recorders.**
- **SLOW SPEED RECORDING—SONY'S SPECIAL FEATURE.**
    - *Tape speed is only 7½ inches per second.*
    - *Tape is only ½" wide.*
    - *Uses only 7" reels for one full hour of continuous recording.*
    - *Tape consumption is low.*
    - *Tape breakage is minimal.*
    - *Mechanical durability is assured.*
- **Solid state circuitry further assures durability.**
- **A home tape library of outstanding television programs can be created.**
- **Tapes can be spliced and edited.**
- **Tapes can be erased for new recordings.**
- **Videocorder screen can be used as a normal TV receiver.**
- **Operates on regular household AC current.**
- **Has carrying handles for easy portability.**

FEATURES: Videocorder TCV-2020

The Videocorder model TCV-2020 has all the features of the TCV-2010 except for the carrying handles. In addition:

- **Housed in a beautiful walnut cabinet.**
- **Has timing device which may be preset to record programs while the owner is away from home.**

Videocorder Model TCV-2010 and video camera kit Model VCK-2000 pack into cases for easy portability.



For more versatile usage of the Videocorder, SONY has developed the VCK-2000 Video Camera Kit. Using this Kit, recordings of any event can be taped with sound for immediate replay on the Videocorder screen. Therefore, a home tape library of important events can be built: Athletes, actors, singers or musicians can record their own performances and study them for improvement. Parades, celebrations and other public events can be recorded on tape for showing at any time in the home. Any family activity such as parties, anniversaries, or weddings can be permanently recorded and stored in the home tape library. Recorded tapes can be played back immediately with no tiresome waiting for developing or processing.

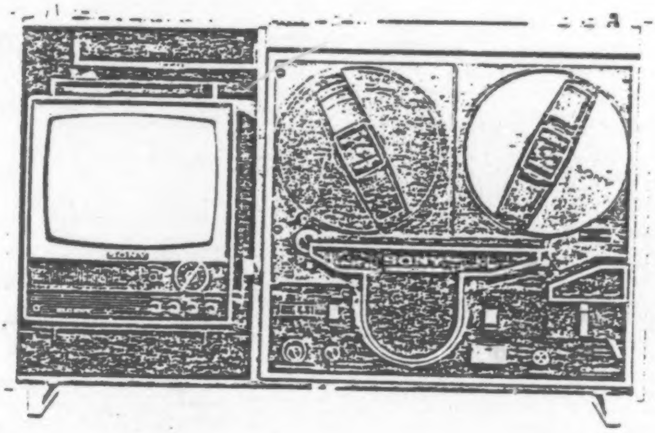
FEATURES: Video Camera Kit VCK-2000

- **Comes complete—camera with standard lens, camera cable, AC cord, tripod, microphone are all in one portable case.**
- **Operation of the camera is simple.**
- **Camera is compact in size.**
- **Telephoto and wide angle lenses can be used.**
- **Camera has view-finder: Videocorder screen can also be used as a monitor when recording.**
- **Camera is solid state—maintenance free.**
- **Operates on regular household AC current.**

Video Camera Kit VCK-2000

Video Camera:	CVC-2000
Tripod:	VCT-10
Camera Cord:	CCF-5, 16.5 ft.
Microphone:	F-87LM (cardioid), uni-directional
AC Extension Cord:	10 feet
Microphone Extension Cord:	EC-5M, 16.5 feet
Case Size:	24-3/8" W x 11-3/8" D x 4-7/8" H
Weight:	20 lbs

SONY VIDEOCORDER—MODEL TCV 2010, 2020



SPECIFICATIONS

Dimensions:	27-1/2" x 16-1/4" x 11"
Weight:	66 lbs.
System:	Receive, record and playback both video and audio signals of U.S. TV Standards in black and white.
Recording Time:	Continuously 60 minutes
Power Souce:	AC 117V, 60 c/s
Power Consumption:	103 W
Tape:	Sony V Series, Width 1/2"
Reel:	Max. Diameter 7"
Video Head:	Rotary 2 head
Audio/Control Head:	Stationary, PP-30-2102C
Erase Head:	Full Truck, EF 51-21
Picture Tube:	9", 90 degree deflection, aluminized screen
Channel Coverage:	VHF, Channels 2-13 UHF, Channels 14-83
Antenna System:	Built-in Telescopic Antenna Jack for 75 ohm External Antenna
Speaker:	2-5/8" x 4", Impedance 40 ohms
Audio Output:	300 mW (undistorted)
Transistors:	76 (Including Mesa and SEP transistors)
Diodes:	38 (Including Esaki Diode)
Thermistors:	4
Selenium Rectifier:	1
Camera Input:	For SONY CVC-2000
Microphone Input:	600 Ohms −60 db. unbalanced
Audio Aux. Input:	High Impedance −20 db. balanced
Audio Line Output:	High Impedance 0 db. unbalanced
Standard Accessories:	Tape V-30 (15 minutes) Reel RH-7V (Diameter 7") Earphone External Antenna Connector EAC-6 Head Cleaner Set

All specifications for the TCV-2020 are the same as Model TCV-2010 except the following:

Cabinet:	Walnut
Clock Timer:	Built-in to record programs in the owner's absence.
Dimensions:	28-3/8" x 16-3/4" x 11-1/4"
Weight:	70 lbs.
Optional Accessory:	Base

SONY VIDEO TAPE

Comes in unique plastic case for convenient storage.

Type	Reel Size	Length	Playing Time
V-32	7"	2370 Ft.	one hour
V-31	7"	1240 Ft.	1/2 hour

REELS FOR SONY VIDEO TAPE

Type	Reel Size
RH-7V	7"

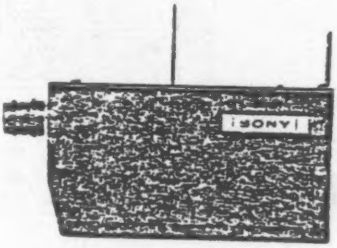
MICROPHONE MODEL [illegible]

Quality dynamic microphone of cardioid directional pattern.

Directivity:	Uni-directional (cardioid)
Frequency Response:	100-12,000 cps
Output Impedance:	Low Impedance (600 ohms)
Output Level:	—57 db

MODEL CVC-2000

Size:	3-1/8" (W) x 5-1/2" (H) x 9-7/8" (L)
Weight:	5.9 lbs.
Standard Lens:	F1.9 25mm, C mount
Vidicon Tube:	SONY M3016
Minimum Luminance:	100 lux (F1.9 lens)
AGC Range:	100 lux to Infinite (F1.9 lens)
Power Source:	AC 117V—60 c/s
Power Consumption:	10 W
Transistors:	26
Diodes:	25



Background and Development of the Videocorder

In 1961, following years of extensive research and development, SONY announced the world's first transistorized video tape recorder and two years later SONY'S video tape recorder model PV-100 appeared. Demands were immediate–hospitals, universities, research laboratories, space installations and major airlines are only a few satisfied customers. SONY is proud of its strong background in the manufacture of Videocorder components.

Consider the transistor itself. SONY has a transistor factory, producing the highest quality transistors in the world. These unique SONY transistors, used in the Videocorder, insure constant SONY quality control.

Consider tape. Tape of the highest quality is essential for SONY'S unique slow speed recording system. SONY manufactures its own tape for video recordings; tape with long life, great sound and picture clarity and constant SONY quality control.

Consider sound tape recorders. SONY is one of the world's largest manufacturers of high quality hi-fidelity sound tape recorders. This background and reputation assures SONY quality in the Videocorder. With this heavy backlog of experience, the world's newest home entertainment development is beyond equal in its field.

SONY CORPORATION OF AMERICA • 580 Fifth Ave., New York, N.Y. 10036
Regional Offices
Western: 500 West Florence Avenue, Inglewood, Calif.
Central: 5551 N. Milton Parkway, Rosemont, Illinois 60018

APPENDIX C

mca
100 UNIVERSAL CITY PLAZA
UNIVERSAL CITY, CALIFORNIA 91608
EXECUTIVE OFFICES
PHONE 985-4321

November 11, 1969

Mr. Akio Morita
Sony Corporation of America
47-47 Van Dam Street
Long Island City, N.Y. 11101

Dear Mr. Morita:

Thank you very much for the invitation to attend the Sony Color Videoplayer demonstration. Unfortunately, I will have to remain in California until the 25th of November. However, my colleague Mr. Schreiber and other representatives of our company are planning to attend the special presentation.

It sounds like an exciting breakthrough for both the motion picture and television industry. May I wish you success. I am confident that we will find a way to work together.

Cordially,

Berle Adams
MCA Inc.

BA:jb

R'cd
11/14/69
A.T.

X

UNIVERSAL v. SONY
Case No. 76 3520 F
Exhibit No. EX
Date MAR 7 1979 Iden.
Date ______ Evid.

APPENDIX D

100 UNIVERSAL CITY PLAZA
UNIVERSAL CITY, CALIFORNIA 91608

PHONE 985 4321

EXECUTIVE OFFICES

December 18, 1975

Mr. Albert D. Cohen
General Distributors of Canada Ltd.
1370 Sony Place, Fort Garry
Winnipeg, Canada R3C 3C3

Dear Albert:

We are off to Hawaii on the 19th and I will be at the Kahala Hilton for three weeks this year.

Congratulations on the official closing of your deal with Sony. I am sure it's constructive for you, your family, the stockholders and Sony.

The Richardson Report is quite interesting and certainly there is a market for "Betamax". I hope that it contributes importantly to your earnings. We are coming along quite well with Discovision and it should be on the market the fall or the end of 1976. There are two different instruments of course, and ours really is for the future of video-audio combined for home use as an extension of the record album market. We are optimistic but it's going to be the public that will tell the story.

With all good wishes for the coming year in which Rita joins me.

Sincerely,

Taft B. Schreiber

UNIVERSAL v. SONY
Case No. 76 3520 F
Exhibit No. KA
Date MAR 7 1979 Iden.
Date ________ Evid.

APPENDIX E

UNIVERSAL CITY STUDIOS, INC., a corporation, dba Universal Television and Universal Pictures, and Walt Disney Productions, a corporation, Plaintiffs,

v.

SONY CORPORATION OF AMERICA, a corporation, the Sony Corporation, a corporation, Carter Hawley Hale Stores, Inc., , a corporation, Associated Dry Goods Corporation, a corporation, Federated Department Stores, Inc., a corporation, Henry's Camera Corporation, a corporation, Doyle Dane Bernbach, Inc., a corporation, and William Griffiths, Defendants.

No. CV 76-3520-F.

United States District Court,
C. D. California.

Oct. 2, 1979.

As Amended Dec. 5, 1979.

Owners of copyrighted audiovisual materials brought infringement action against manufacturers, distributors, retailers and advertisers of videotape recorder. The District Court, Ferguson, J., held that: (1) copyright holders of audiovisual materials, some of which were sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of video tape recorder in their homes for private, noncommercial use; (2) retailer did not infringe upon copyrights where it did not compete with nor profit from materials and intended only to demonstrate recorder; (3) even if home-use copying constituted infringement, neither manufacturers, distributors, retailers, nor advertisers were liable under theories of direct or contributory infringement or vicarious liability; and (4) even if they were deemed liable, injunctive relief was not available where they did not unfairly compete with owners of copyrighted materials nor interfere with their advantageous business relations.

Judgment for defendants.

1. Copyrights and Intellectual Property 🔑53.2

Courts applying the Copyright Act of 1909 created the fair-use doctrine to immunize some forms of copying from the literal implications of the Act. 17 U.S.C. (1970 Ed.) § 1.

2. Copyrights and Intellectual Property 🔑36

Broad language of the Copyright Act of 1976, suggesting that copyright holders have monopoly power over all reproductions of their works, does not include reproductions of sound recordings for home use. 17 U.S.C.A. §§ 106(1, 4, 5), 107.

3. Copyrights and Intellectual Property 🔑36

Copyright holders of audiovisual works do not have monopoly power over off-the-air recording of their works for home use. 17 U.S.C.A. §§ 106(1, 4, 5), 107.

4. Copyrights and Intellectual Property 🔑53.2

Doctrine of fair use devised while the Copyright Act of 1909 was in effect creates a privilege in other than the owner of a copyright to use a copyrighted material in a reasonable manner without his consent notwithstanding the monopoly granted to the owner. 17 U.S.C. (1970 Ed.) § 1.

5. Copyrights and Intellectual Property 🔑53.2

Factors for determining applicability of fair-use doctrine devised while the Copyright Act of 1909 was in effect included the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the material used in relation to the copyrighted work as a whole, and the effective use of the copyright owner's potential market for the value of his work. 17 U.S.C. (1970 Ed.) § 1.

6. Copyrights and Intellectual Property 🔑53.2

Fourth factor of harm to the copyrighted work is or should be considered first when determining applicability of doctrine of fair use devised by the Copyright Act of 1909 was in effect and incorporated in the revised Act of 1976. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

7. Copyrights and Intellectual Property 🔑53.2, 86, 87(1)

Issue of harm to doctrine of fair use in a copyright case is important to a determination whether use is fair, whether an injunction is appropriate, and whether, assuming infringement, damages are sustained. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

8. Copyrights and Intellectual Property 🔑85

As to issue of an injunction in a copyright case involving doctrine of fair use, question is whether any irreparable harm will occur if an injunction is not issued. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

9. Copyrights and Intellectual Property 🔑87(3)

Under both the Copyright Act of 1909 and the revised Act of 1976, once infringement is found, statutory damages can be awarded when no actual damages have been proven. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

10. Copyrights and Intellectual Property 🔑53.2

Harm which imperils the existence of a publication is more destructive of a fair-use defense than is harm which would limit profits. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

11. Copyrights and Intellectual Property 🔑36

Copyright law does not protect authors from a change or new considerations in the marketing of their products. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

12. Copyrights and Intellectual Property 🔑53.2

Any harm which might be possible must be weighed with other factors in determining whether doctrine of fair use creates a privilege to use copyrighted material in a reasonable manner. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

13. Copyrights and Intellectual Property ⇨53.2

Purpose of use, one of factors to be considered in determining application of fair-use doctrine, is determined by asking whether copyrighted material is used for criticism, research or other independent work. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

14. Copyrights and Intellectual Property ⇨53.2

That use involves copying the entire work does not defeat the defense of fair use if, when considered with nature of material and noncommercial private use, taking of whole still constitutes fair use because there is no accompanying reduction in market for original work. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

15. Copyrights and Intellectual Property ⇨67.1

Copying of copyrighted audiovisual material on a video tape recorder in one's home for private, noncommercial use constitutes fair use of material in that it is limited to home recording and playback of audiovisual material broadcast free of charge over public airways, is noncommercial, and does not reduce market for material. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

16. Copyrights and Intellectual Property ⇨36

Copyright holders of audiovisual materials, some of which were sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of videotape recorder in their homes for private, noncommercial use 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

17. Copyrights and Intellectual Property ⇨67.1

Demonstration copying and playback of copyrighted audiovisual materials by retailers of videotape recorder constituted fair use of materials and did not constitute infringement in that they did not compete with or profit from materials and only intended to demonstrate recorder. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

18. Copyrights and Intellectual Property ⇨77

Even if recording of off-the-air telecasts of copyrighted audiovisual materials in one's home for private, noncommercial use constituted infringement and was not fair use, neither manufacturers, distributors, nor retailers of videotape recorder were liable under theories of direct or contributory infringement or vicarious liability. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

19. Trade Regulation ⇨445

Manufacturers, distributors, and retailers of videotape recorder were not liable under law of California for unfair competition and fraudulent business practices even if off-the-air recording of telecasts of copyrighted audiovisual materials in one's home for private, noncommercial use constituted infringement and was not fair use. West's Ann.Cal.Civ.Code, § 3369; West's Ann.Cal. Bus. & Prof.Code, § 17500.

20. Copyrights and Intellectual Property ⇨86

Even if recording of off-the-air telecasts of copyrighted audiovisual materials for private, noncommercial use in one's home constituted infringement and manufacturers, distributors, retailers, and advertisers of videotape recorder were liable therefor, where they did not unfairly compete with owners of copyright or interfere with their advantageous business relations, injunctive relief was not available. 17 U.S.C. (1970 Ed.) § 1; 17 U.S.C.A. §§ 106(1, 4, 5), 107.

Stephen A. Kroft, John G. Davis, Edwin M. Smith, Rosenfeld, Meyer & Susman, Beverly Hills, Cal., for plaintiffs.

Dean C. Dunlavey, Donald E. Sloan, Gibson, Dunn & Crutcher, Los Angeles, Cal., Max Freund, Ambrose Doskow, and Joel Sternman, Rosenman, Colin, Freund, Lewis & Cohen, New York City, for defendants

Sony Corp. of America, Sony Corp. and Doyle Dane Bernbach Intern., Inc.

Marshall A. Rutter, Warren G. Greene, Rutter & Ebbert, Los Angeles, Cal., for defendants Carter Hawley Hale Stores, Inc., Associated Dry Goods Corp., Federated Department Stores, Inc. and Henry's Camera Corp.

FERGUSON, District Judge.

Article I, § 8, Cl. 8 of the United States Constitution empowers Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Copyright Act passed by Congress in 1909 and revised in 1976 gives authors exclusive rights over some but not all uses of their works. As the Supreme Court wrote in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S.Ct. 2040, 2044, 45 L.Ed.2d 84 (1974):

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. (footnotes omitted).

This case tests the scope of copyright protection for audiovisual material broadcast on public airwaves, and its resolution requires balancing of strong competing claims.

Plaintiffs, Universal City Studios, Inc. ("Universal") and Walt Disney Productions, Inc. ("Disney"), are producers and copyright owners of audiovisual material, some of which they choose to sell for telecast over public airwaves. Defendants include the manufacturer, Sony Corporation ("Sony"), and the distributor, Sony Corporation of America ("Sonam"), of the "Betamax," a videotape recorder ("VTR") which can record this telecast off-the-air and make a copy of the audiovisual material which can be viewed at another time. Other corporate defendants are certain retail stores (Carter Hawley Hale Stores, Inc.; Henry's Camera Corporation; Associated Dry Goods Corporation; and Federated Department Stores, Inc.) which sell the Betamax, and the advertising agency, Doyle Dane Bernbach, Inc. ("DDBI") which promotes it. The only individual defendant is William Griffiths who used his Betamax in his home to copy plaintiffs' broadcast material for his own home use.

Plaintiffs' main contentions are that this recording and that of other individuals infringed their copyrights and that the corporate defendants are either direct or contributory infringers or are vicariously liable for the infringement. Plaintiffs also contend that defendants have interfered with their business relations and unfairly competed with them. Finally, plaintiffs assert that the retail defendants violated copyright law when they recorded portions of plaintiffs' programs to demonstrate the Betamax to a prospective purchaser.

Plaintiffs allege that they will suffer great monetary damage if this infringement is allowed to continue. Defendants contend that home copying for home use is not an infringement and, even if it were, defendants could not be held responsible under any theory of infringement or vicarious liability. The resolution of these issues first requires a determination of whether Congress gave authors monopoly power over this use and, if so, whether the corporate defendants are in any way liable. As will be discussed, these determinations are not easily made. Protection of the public interest requires balancing the need for wide availability of audiovisual works against the need for monetary reward to authors to assure production of these works.

After three years of litigation, five weeks of trial and careful consideration of extensive briefing by both sides, this court finds:

a) Neither the Copyright Act of 1909 ("Old Act") nor the revised Act of 1976 ("New Act") gave copyright holders monopoly power over an individual's off-the-air copying in his home for private, non-commercial use. This court is not deciding whether tape duplication or copying from pay television is prohibited. Nor is this court ruling on off-the-air recording by individuals or groups for use outside the home.

b) Even if the Copyright Act did prohibit home-use copying, Sony, Sonam, DDBI and the retail stores would not be liable under any of the theories of direct or contributory infringement or vicarious liability.

c) The retail defendants have not infringed plaintiffs' copyrights.

d) Even if home-use copying were infringement and defendants were deemed liable therefor, this court could not grant the injunctive relief requested by plaintiffs.

e) None of the defendants has unfairly competed with plaintiffs or interfered with their advantageous business relations.

In so holding, this court makes the following factual findings.

THE PARTIES

Plaintiff Universal is a Delaware corporation with its principal place of business in Los Angeles County, California. Universal has done business under its own name and under the names, among others, of Universal Television, Universal Pictures, Universal 16 and United World Films. Universal is a wholly owned subsidiary of MCA, Inc. ("MCA"). Plaintiff Disney is a California corporation with its principal place of business in Orange County, California. Both Universal and Disney produce movies and other audiovisual works for theatrical and television exhibition.

Defendant Sony Corporation is a corporation duly organized and existing under the laws of the Country of Japan. Sony manufactures the Betamax videotape recorder. Defendant Sony Corporation of America is a New York corporation with its principal office in Los Angeles County, California. Sonam is a corporation duly organized and existing under the laws of the State of New York and qualified to do business and doing business in the State of California. Sonam distributes the Betamax in the United States.

Defendants Carter Hawley Hale Stores, Inc. ("Carter Hawley") and Henry's Camera Corporation ("Henry's Camera") are California corporations. Defendant Associated Dry Goods Corporation ("Associated/Robinson") is a Virginia corporation and defendant Federated Department Stores, Inc. ("Federated/Bullock's") is a Delaware corporation. All of these retail stores (the "retail defendants") do business in Los Angeles County, California and sell the Betamax.

Doyle Dane Bernbach, Inc. is a corporation duly organized and existing under the laws of the State of New York, and is and at all times material to this action was, doing business in Los Angeles County, California. DDBI is an advertising agency retained by Sony to advertise the Betamax.

Defendant William Griffiths is a resident and citizen of California and is an owner and user of the Betamax.

UNIVERSAL'S PRODUCTS

Universal produces motion pictures for exhibition in theaters and for television. Some of those released to theaters are subsequently licensed for television exhibition, either to pay television or to network television. Network telecasts generally consist of two or three runs. After network licensing and exhibition, Universal may license its theatrical motion pictures to local television stations in syndication (generally for three to eight runs) and occasionally will then redistribute them to the theaters. Universal also offers some of its theatrical motion pictures or excerpts thereof for rental to consumers, schools and institutions in the "non-theatrical" 16 mm and 8 mm exhibition markets.

Universal also recently began marketing theatrical motion pictures on prerecorded videodiscs. Many of these motion pictures were previously exhibited on television. In the future, Universal plans to release theatrical motion pictures on discs before the first television exhibition as well as after the motion pictures have been televised.

Universal's made-for-television motion pictures consist of television features, weekly series and novels made for television (i. e., "mini-series"). With the exception of "Operation Prime Time," these motion pictures are first exhibited on network television. Universal's first run network licenses of series are usually executed before production starts and are for two showings of each episode in the year of production, with an option to renew for each of the next four years. The number of yearly episodes of a series normally runs from 13 to 22. Universal executives testified at trial that the first run network license fee normally does not cover the cost of production of a series.

In recent years Universal has produced mini-series which are first licensed to a group of approximately 100 local stations under the title "Operation Prime Time." Licenses for these mini-series are also available on an ongoing basis to additional local stations. The Operation Prime Time licenses are generally for six runs with many of the stations telecasting the first two runs within seven days of each other.

After Universal's television products have been shown on network, approximately half of them are licensed for rerun exhibition on late night network, on network daytime television, and/or by syndication. A syndication requires approximately 60-120 episodes, which means 3-5 years of successful first run network exhibition if the package is all of one series. Syndication licenses of a successful series may be executed as early as the third year of first run network exhibition, but the syndication exhibition does not begin until after the fifth year. Once programming has been syndicated, it seldom goes back to network.

Series are syndicated for approximately six showings of each episode over 4-6 years; theater films are syndicated for 3-8 showings each over 3-6 years. Universal has approximately 54 series available for syndication and is adding new ones at a rate of two or three a year; it has approximately 2000 theater films in syndication, available by groupings. Altogether, it has over 3000 syndication licenses covering more than 300,000 different programs.

DISNEY'S PRODUCT

Disney has an extensive film library of animated and live action films resulting from 52 years of motion picture production for theater. Included in the library are approximately 24 feature length programs (both animated and live action) which Disney regards as "classics." These classics are exhibited only in theaters and are re-issued approximately every 7-10 years. They include such titles as *Snow White*, *Mary Poppins* and *Jungle Book*. Only three of Disney's feature length animated films have ever been licensed to television.

Disney licenses many of its other theatrical motion pictures to television, generally first for network exhibition and thereafter to pay television. On at least one occasion, however, Disney licensed a motion picture to pay television before licensing to network. Disney has not to date licensed any of its theatrical motion pictures in syndication. Many of Disney's theatrical motion pictures have been the subject of one or more network reruns. After network exhibition, Disney, like Universal, licenses some of its theatrical motion pictures for 16 mm rental. It also licenses excerpts of some for sale on 8 mm film. Within the past year, Disney has also offered some of its theatrical motion pictures for sale on videodisc.

Disney's library includes approximately 500 cartoons, each being 6-8 minutes in length. These cartoons receive varying kinds of exhibition, on a revolving basis, including theatrical, rental in the form of 16 mm full length films, and sale in the form of 8 mm excerpts.

The only programming currently licensed by Disney to a network is the one hour, weekly *Wonderful World of Disney*—pursuant to a contract with NBC executed in late 1977 and expiring in the fall of 1981. The license calls for Disney to supply 24 "new" programs and 24 "repeat" programs each twelve months, with one lump sum being paid for four of these new programs and a uniform fee being paid each time Disney delivers one of the other 20 new programs. In the 1977-78 television season, six of the new programs were created for the series and the other 18 new programs came from Disney's library. The uniform fee per new show covers about 75% of the cost of each program created for the series and exceeds the cost of providing each of the "new" programs from Disney's library.

Programming supplied to NBC never is syndicated or licensed to others during the term of the contract but will be available later.

The only Disney programming now being exhibited by syndication is the New Mickey Mouse Club. This is a series of 104 half-hour episodes which was once syndicated in approximately 60 television markets and is now tailing out in the last 30 or 40 of these markets. This series is out of production and no new syndication licenses are being made.

BETAMAX AND OFF-THE-AIR RECORDING

Three components are required to record off-the-air and play back on the average television set: (a) the videotape recorder; (b) the tuner; and (c) the radio frequency adapter. When audiovisual materials are televised, the broadcaster telecasts radio frequency ("RF") signals over the public airwaves. The videotape recorder alone, however, does not receive and record these signals. A tuner is necessary to receive the RF signals and change them to audio and video signals. These signals are the ones recorded on the magnetic tape of the videotape recorder. To play this tape back on a regular TV or a monitor, an RF adapter is necessary to convert the audio-video signals to RF signals.

The Betamax machines contain all three components. Before Betamax, as early as 1965, Sony manufactured other videotape recorders—some of them with built-in adapters and tuners and others without. Sony and other manufacturers market and sell separately all three components. Thus, even without the Betamax machines, a person could assemble a system for off-the-air recording after purchasing the components separately.

The Betamax machine is marketed in at least four models: LV 1901, SL 7200, SL 8200 and SL 8600. These models vary in the options they offer. The SL 8600, for example, has a built-in timer and a remote pause control. The SL 8200 has a slowdown capacity which allows one to record two hours of material on a one-hour tape. These recorders range in price from approximately $875–$1000.

Sony also manufactures and sells tape cassettes for the various Betamax models. Some of these tapes can be used with only one particular Betamax model. None of the Sony cassette tapes can be used with other manufacturers' videotape recorders. The longest cassette tape made by Sony allows three hours of recording. The price for this 3-hour tape is approximately $21.

The Betamax tuner and RF reception capability is not dependent on the television set to which it is attached for playback. Betamax can record broadcasted material on one channel while the television set is off or is receiving and showing signals on another channel. Thus it is possible to view one show while taping another and to tape a show while not viewing at all, or even while away from home. This latter function is possible because the Betamax also includes a timer which can be set automatically to activate the recording system at a certain time.

The Betamax also includes a pause button and a fast forward capability. Sony has also developed remote control pause buttons and these are part of the 8600 model. Even prior to this, however, such devices could be added to one's system. The pause button allows an operator to stop whatever function—record, play, fast-forward, reverse—the machine is in. Therefore, if the individual views the material while it is being recorded and decides he doesn't want something on the tape, he can use the pause button to omit that segment of the broadcast from the recording. Of course, an individual must be both present and viewing to do this.

The fast forward makes it possible to avoid watching on playback a segment that has been recorded. While viewing the tape, an individual can fast forward through an undesired segment. For the most part, however, the viewer must guess as to when the undesired segment has been passed.

The Betamax and other Sony videotape recorders can also record signals from a video camera. Thus it is possible to purchase a camera, plug it into a videotape recorder, and make one's own film on a videocassette. This can then be played back on a monitor.

ADVERTISING

DDBI is Sonam's advertising agency for consumer products. Since the introduction of the first Betamax model, DDBI, in cooperation with Sonam, has created and published Betamax advertisements for magazines, newspapers and television. In November, 1975, Sonam agreed to indemnify DDBI for any liability arising from this advertising campaign.

Many of these national ads for the Betamax have been introduced into evidence. Some of these exhort the public to "record favorite shows" or "build a library." Some have suggested recording "novels for television" and "classic movies." None of the Betamax advertisements warns that recording copyrighted shows is or may be a copyright infringement.

In addition to the DDBI national advertising campaign, Sonam operates a cooperative advertising program. Under this program, individual franchise dealers write and place ads for the Betamax and, if Sonam approves the ads, the local dealer receives 5% of the cost of the ads as a credit to the balance owed Sony for previously purchased merchandise.

Henry's Camera has participated in this program and has received credit for advertisements with "record your favorite show" and "build a library" language.

WARNINGS

None of the Betamax models or the brochures describing them contains warnings about copyright infringement. Pre-Betamax videotape recorders manufactured by Sony (the U-Matic, AV and CV series) had a small plate attached to the back stating: "This videotape recorder is not to be used to record copyrighted works."

The Betamax operating instructions, however, include a warning about possible copyright infringement. On page 17 of the instruction booklet, the following language appears: "Television programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws." The Betamax machine and this accompanying booklet are delivered to the purchaser in a sealed box.

The Betamax warranty states that there shall be no liability on the part of the manufacturer, distributor or seller for any loss or damage arising directly or indirectly from the use of the Betamax.

EVIDENCE OF HOME-USE COPYING

A. *William Griffiths*

Defendant William Griffiths started recording television programs off-the-air in 1973 or 1974 using a pre-Betamax videotape recorder made by Sony. He then learned about the Betamax while he was in Japan and instructed his sons to buy him one in the United States at the first opportunity. Griffiths owns a model 7200 purchased by his sons from defendant Henry's Camera. Griffiths never spoke to anyone at Henry's Camera about Betamax, and he was not induced to buy his Betamax by virtue of any advertisements. He owns approximately 100 tapes. When Griffiths bought his Betamax, he intended not only to time-shift (record, playback and then erase) but also to build a library of cassettes. Maintaining a library, however, proved too expensive, and he is now erasing some earlier tapes and reusing them.

Griffiths copied about 20 minutes of a Universal motion picture called "Never Give An Inch," and two episodes from Universal television series entitled "Baa Baa Black Sheep" and "Holmes and Yo Yo." He would have erased each of these but for the request of plaintiffs' counsel that it be kept. Griffiths also testified that he had copied but already erased Universal films called "Alpha Caper" (erased before anyone saw it) and "Amelia Earhart." At the time of his deposition, Griffiths did not intend to keep any Universal film in his library.

Griffiths has also recorded documentaries, news broadcasts, sporting events and political programs such as a rerun of the Nixon/Kennedy debate.

Griffiths is a client of plaintiffs' law firm and consented to being a defendant in the lawsuit. Plaintiffs have waived any claim for damages or costs against Griffiths for his activities alleged in the complaint. Plaintiffs never expected Griffiths to be represented by counsel and he has not been.

B. *Marc Wielage*

Mr. Wielage is not a defendant in this case. Plaintiffs do allege, however, that the corporate defendants are liable for any infringement of plaintiffs' copyrights by him.

Wielage is a video equipment salesman, he has an FCC license authorizing him to adjust commercial television transmitters, and he has been employed in the past as a professional switcher (between programs and commercials) at commercial television stations. The Betamax is Wielage's primary hobby; he even has a padded suitcase which he uses to carry his Betamax on trips with him. Wielage owns three Betamax recorders—a 7200, an 8200, and an SLO 320. He uses the SLO 320 with an outboard tuner and he has modified the other two. He owns approximately 340 Betamax tapes.

Wielage was recording television programs with a U-matic 1600 before Betamax was available. He knew videotape collectors and library builders who owned and used the U-matic to record off-the-air prior to Betamax. He bought Betamax because it was the first videotape recorder he could afford and he intended to use it to time shift and to build a library. Wielage writes articles of a technical nature for "Videophile" magazine, a subscription publication for VTR owners.

Wielage has recorded programs from pay television. He has traded tapes with some 25–30 people, most of whom he has contacted through the Videophile magazine. He exchanges "want lists" of films with these people. All of the tapes that Wielage has made or otherwise acquired are for his own personal use, and he watches them either alone or with a few friends.

As a result of some research that he did, Wielage felt uncertain about the propriety of copying copyrighted material, but he did not rely upon anything from the defendants in forming his conclusions. The copyright warning in the Betamax instruction manual did not alter his usage.

The evidence showed that Wielage had recorded off-the-air from some Universal films—*viz.* "Frankenstein," "Bride of Frankenstein," "Son of Frankenstein," "The Mummy," "Time of Their Lives," "Wolfman," "This Island Earth," "The Mummy's Hand," and "Duck Soup." He copied all of these prior to January 1, 1978. Of the remaining Universal films allegedly copied off the air by Wielage after January 1, 1978, only one, "Saboteur," was actually copied by Wielage. He acquired the others from friends, *viz.*, "Duel," "House of Frankenstein," "House of Fear" and "Horse Feathers."

Wielage copied at least one episode of the New Mickey Mouse Club. He also copied the following cartoons which were contained within six other episodes of the New Mickey Mouse Club: *viz.*, "Firechief," "Mickey's Parrot," "Trick or Treat," "Tortoise and the Hare," "Clock Cleaners," and "The Pointer." There was no evidence that he had recorded "Autograph Hound" as alleged. None of these cartoons bore its own copyright notice when Wielage made the copies. The only Disney film that Wielage copied after January 1, 1978 was an episode of *The Wonderful World of Disney* called "Chip and Dale/Mixed Nuts." Wileage also possessed recordings of the Disney films called "On Vacation With Mickey Mouse and Friends" and "This is Your Life Donald Duck."

C. *Mr. and Mrs. Clinton Bird*

Plaintiffs allege that Mr. and Mrs. Bird copied two episodes of a Universal television series entitled "Bionic Woman" and that defendants are liable for this infringement. There is no evidence to support this allegation except two tapes which plaintiffs' attorney said were made by the Birds.

D. *James Lowe*

Plaintiffs also allege that the corporate defendants are liable for copying done by Mr. Lowe. Lowe owns a 7200 Betamax and about 170 tapes. Lowe is an attorney who has formed his own opinion that it is legal to record off-the-air. Lowe is also the publisher of the "Videophile." No defendant is involved in the Videophile in any way.

Lowe recorded the Universal film "Psycho" and he intends to erase it. Lowe's son recorded a few 7–8 minute cartoons contained within episodes of the New Mickey Mouse Club and the two of them watched these together when Lowe got home from work. The cartoon titles were: "Donald Applecore," "Pluto's Quinpuplets," "Modern Inventions," "Two Chips and a Miss" and "Donald's Better Self." Lowe's own second recording was a cartoon entitled "Spare the Rod." None of the New Mickey Mouse Club episodes was recorded except for the foregoing cartoons.

Lowe generally views what he has recorded and then erases it. Lowe has erased some cartoons and would have erased the rest of them except that they are in the middle of tapes containing other items.

E. *Geoffrey Soule*

Geoffrey Soule owns a 7200 Betamax. He knew about other videotape recorders on the market, but the Betamax was the first he could afford. He could not remember seeing any of defendants' ads before purchasing his Betamax. He bought the Betamax for time shift usage, and this proved to be about 95% of the actual use he made of it. He always had the impression (not gained from Sony) that it was permissible to record off television provided he did not sell what he copied. Soule's general usage of Betamax recordings was to watch once and then erase.

Soule did record the Marx Brothers movies "Horse Feathers," "Coconuts" and "Duck Soup" but he never watched a playback of any one. In fact, he planned to erase the movies because he was not watching them for lack of time and interest, and it was too expensive to keep them.

SURVEYS OF USAGE

Both plaintiffs and defendants conducted surveys of Betamax owners to ascertain use of the recorder. Field Research Corporation conducted plaintiffs' survey and Crossley Surveys, Inc. conducted defendants' survey. From June 27–July 7, 1978, plaintiffs interviewed by telephone 805 adults who identified themselves as the household member most familiar with the use of the VTR. Of the 805 interviewees, 23 owned a non-Sony VTR. From August 3–24, 1978, defendants interviewed by telephone 998 persons identified as the household member who uses the Betamax most frequently. Both surveys are extensive. Some of their findings are as follows:

- Plaintiffs' survey found that the average number of cassettes owned by the interviewees was 31.73. 63.9% of plaintiffs' interviewees had less than five cassettes with movies on them and 81.1% had less than five cassettes with television programs on them. Defendants' interviewees reported an average of 25.21 cassettes with material recorded off-the-air.
- According to plaintiffs' survey, 75.4% of the VTR owners use their machines to record for time-shifting purposes half or most of the time. Defendants' survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.
- When plaintiffs asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants' survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing.

- According to plaintiffs' survey, [illegible] of the owners eliminate commercials from the recording either "sometimes," "rarely," or "never"; 36.1% use the fast-forward to pass commercials either "sometimes," "rarely," or "never."

- Defendants found that 32.4% of the recording done by Betamax owners in the past month was done while they were gone or viewing another channel (and therefore could not use the pause button to eliminate the commercials). 17.6% of the recording was done while viewing, with the pause button being used 3.1% of the time. While viewing playbacks in the past month, defendants' interviewees fast-forwarded through commercials in 24.6% of them.

- Defendants further found that for 89.8% of the interviewees, most of the cassette playback was with family members only. 31.9% of the defendants' interviewees watched the same amount or more of regular television as they did before owning a Betamax. 83.2% reported their frequency of movie going was unaffected by Betamax.

RECORDING BY RETAIL DEFENDANTS

Plaintiffs hired Paul Ruid, a private investigator, to visit retail stores to observe videotape recorder marketing practices. Plaintiffs' attorneys instructed him to ask for demonstrations.

Ruid visited the Broadway (Carter Hawley) on October 1, 1976 and asked for a demonstration of the Betamax. The salesman showed him a playback of part of an unidentified episode from a Universal series called "Adam 12." It was never determined who had made the recording.

Ruid visited the Broadway again on October 18 at a time when he knew that an old Universal series called "Major Adams" was being telecast. Ruid again asked for a demonstration and this time added a request that "something in the nature of an old movie" be recorded. As he had hoped, a portion of "Major Adams" was recorded. Ruid visited Associated/Robinson's on October 14, 1976, at a time when he knew that a Universal series called "Gemini Man" was being telecast. He found "Gemini Man" already being shown on television demonstration sets at the store, and he asked for a demonstration of the Betamax. The salesman made two 3-minute recordings of the program, the second to correct what he thought was an error in the first.

Ruid visited Federated/Bullock's on October 14, 1976 at a time when he knew that a Universal mini-series called "Captains and the Kings" was being telecast. He found the television demonstration sets already showing an episode from "Captains and the Kings," and he requested a demonstration of Betamax. In response, the salesman put the Betamax in the record mode. Ruid never saw a playback, and he could not say whether "Captains and the Kings" had been successfully recorded.

Nobody but Ruid ever saw the demonstration playbacks which he had requested and Ruid never saw Betamax demonstrated to anybody else. Ruid did not go to Henry's Camera and request a demonstration. Henry's Camera normally records for about one minute during customer demonstrations at its store.

HARM TO PLAINTIFF

Plaintiffs admitted that at the time of trial, no existing contract, license or advantageous business relationship of either Universal or Disney had been injured, interfered with or disrupted by the sale or use of Betamax and Betamax tapes or by any other activity of any defendant. This includes without limitation plaintiffs' theatrical, television, 8 or 16 mm, and video-disc products.

In addition, plaintiffs conceded that neither the sale nor the use of Betamax and Betamax tapes had by the time of trial caused Universal or Disney any measurable monetary damage, economic loss or revenue loss. 1978 was a very successful year for both Universal and Disney. It was Disney's eleventh consecutive year of increased profit and the most profitable year in history for Universal Pictures' Theatrical Division.

Universal's television revenues had increased steadily over the three years prior to trial and Disney received its highest television income in 1978.

Plaintiffs did present extensive expert testimony at trial on the issue of prospective harm. Executives of both Universal and Disney testified that in the future Betamax would decrease the value of their copyrights in a number of ways, *e. g.*, by exhausting interest in reruns and by fragmenting the live television audience. These predictions are discussed extensively below. Uniformly, however, these experts were unable to predict at what point in either time or Betamax sales such harm would occur.

THE BROADCASTING INDUSTRY

There are 727 commercial television stations in the United States, 516 broadcasting very high frequency ("VHF") signals and 211 broadcasting ultra high frequency ("UHF") signals. These commercial stations are spread out geographically over approximately 235 television "markets."

There are currently three commercial television networks in the United States, each network owning and operating ("O&O") some television stations and having many more stations as "affiliates"—each such station being the network's exclusive outlet in its particular market. Those stations which are not owned by, or affiliated with, a network are called "independents." Each network feeds programming to its affiliates from approximately 7:00 a. m. to 11:00 p. m., with approximately five hours of local programming interspersed in that time period. The network pays the affiliate to broadcast its material. The affiliate can reject the network programming and broadcast local programming if it wishes. The affiliate can also tape the network programming and broadcast it up to seven days at a time when no network programming is being provided.

The commercial networks and stations obtain their revenue primarily from advertisers, who pay to have their commercials telecast. Advertisers buy time (1) on network programming, (2) on a national "spot" basis, and (3) on a local basis—the individual stations receiving the revenue directly on the latter two bases. A typical affiliate station obtains 10% of its revenue from the network and 45% each from national spot and local advertising. The network feed contains commercials but also allows "station breaks or position," wherein the local station may insert national "spot" or local advertising and keep the revenue.

The prevailing "unit" of commercial advertising time is 30 seconds. The rule of thumb is that the larger the perceived rating of the program carrying the commercial, the larger the advertising fee. This fee can run from $45,000 to $125,000 per 30 second commercial for a prime time network slot.

There are also 259 public/educational television stations in the United States, 101 being VHF and 158 being UHF, none of which is commercial network owned or affiliated. Approximately 200 of the public/educational stations are interconnected by a network called the Public Broadcasting Service. Some educational stations are also members of regional networks—*i. e.*, the Eastern Educational Network.

The public/educational stations do not carry advertising and obtain their operating funds from individual and governmental contributions.

The three commercial networks obtain their programming, in part, by virtue of licenses each makes with producers to show the producer's programs. Individual stations, *viz.*, O&O's affiliates and independents, also make such licenses with producers—through syndication. Syndication, as indicated earlier, is generally undertaken only for rerun material—and often is for a kind of exhibition called "stripping," which means running the same series at the same time of day five days a week. Individual stations also create some of their own programming—*i. e.*, commercial stations approximately 16 hours per week and public/educational stations approximately 11 hours per week.

RATINGS

The fees which networks and stations pay producers to show their programs, and the fees which advertisers pay networks and stations to show their commercials (sometimes measured in "cost per thousand," *e. g.*, $5/1000 households) are influenced substantially by the size and demographics of the audience which the programs (and hence the commercials) are expected to reach. For rerun programming, larger audiences obtained during prior showing generally increase the expected audience, and hence the fee, for rerun licensing.

Audience measurement uses several criteria. One size criterion is "ratings"—one rating point is one percent of all homes owning television sets in the relevant market. Nationally, there are approximately 75 million homes owning television, and one national rating point represents 750,000 homes. There is believed to be an average of two individuals viewing television in each home. Another size criterion is "market share"—a percentage figure, indicating what percent of all homes using television ("HUT"), *i. e.*, with television sets turned on in the relevant market at a given time, is tuned to a particular network or station. The criterion of "demographics" is basically a measurement of sex, age, and income bracket of the audience.

Nielsen and Arbitron perform audience measuring services for broadcasters, advertisers, and producers. Nielsen's National Television Index is a ratings service in which a meter attached to each television set in 1200 sample households continuously records what channel the set is tuned to while in use. This meter service does not tell who, if anyone, is watching the set. Ratings measurements are subject to a margin of error of plus or minus 1 to 1½ points. Nielsen's National Audience Composition Service surveys 2400 sample households by providing diaries in which the households keep a record of the viewing actually done by individuals in the household. Diaries are also the source of demographic information. Nielsen also provides a meter service comparable to its national meter service in four local markets. Nielsen's fourth service is the Nielsen Station Index, which uses diaries and reports individually and periodically on some 200 local market areas. These latter diaries, distributed to households four times a year during so-called "sweep periods," cover four weeks each.

The Nielsen meter services already measure videotape recording but do not yet make any measure of playback. At the time of trial, the Nielsen diary surveys made no specific reference to videotape recorder usage, and the only playback information obtained was what people volunteered in the diary.

The Arbitron rating service provides a meter service in three local markets and also a diary service in individual markets in the rest of the country. Arbitron also has sweep periods which are almost the same as Nielsen's. Arbitron was not measuring any videotape recorder usage at the time of trial.

Both Nielsen and Arbitron are capable of obtaining substantially the same kind of information with respect to videotape recorder usage as they presently do with respect to television set usage. Both Nielsen and Arbitron have conducted pilot surveys with videotape recorder owners in order to develop a framework for additional survey work, all leading to the ultimate measurement of videotape recorder usage.

In attempting to maximize ratings and audience shares, networks frequently broadcast their better and stronger programs at the same time—a practice known as "counter-programming." Heightened competition during sweep periods encourages counter-programming.

LEGAL CONTENTIONS

The above discussion sets forth the factual background for this lawsuit. The fundamental legal premise of this litigation is plaintiffs contention that the activity of the individual and the retail defendants in recording plaintiffs' copyrighted works off-the-air is copyright infringement. With this basis, they assert that the involvement of Sony, Sonam, DDBI, and the retail stores in the manufacturing, distributing, advertising, and selling of the Betamax makes the defendants liable as direct or contributory infringers or under the theory of vicarious liability. Finally, building on these assertions, plaintiffs look to the economic arrangements of today's broadcasting industry and foresee irreparable harm to themselves from these allegedly infringing activities. They ask this court for injunctive relief to prevent future infringement.

Plaintiffs' legal argument depends on the basic assumption that the off-the-air recording of their works by defendant William Griffiths and other individuals as well as by the retail defendants constitutes infringement. Because plaintiffs predict the greatest harm from individuals' home-use copying, this court has considered the issue of infringement first with respect to home-use recording and then with respect to the retail defendants' store demonstrations.

HOME-USE RECORDING

"Home-use" recording as used in this opinion is the operation of the Betamax in a private home to record a program for subsequent home viewing. The programs involved in this lawsuit are broadcast free to the public over public airwaves. The court heard extensive testimony from defendant William Griffiths and four non-defendant individuals about this activity, and the court's declaration of non-infringement is limited to this home use-situation.

It is important to note the limits of this holding. Neither pay nor cable television stations are plaintiffs in this suit and no defendant recorded the signals from either. The court is not ruling on tape swapping, organized or informal. The court is not ruling on tape duplication within the home or outside, by individuals, groups or corporations. Nor is the court ruling on off-the-air recording for use outside the home, *e. g.*, by teachers for classrooms, corporations for employees, etc. No defendant engaged in any of these activities and the facts necessary to determine their legality are not before this court.

The ramifications of this new technology are greater than the boundaries of this lawsuit. A court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder.

I. *INFRINGEMENT AND FAIR USE*

Recordings made prior to January 1, 1978 are governed by the Old Act (1909) and those made after that date are governed by the New Act (1976). The testimony showed that Marc Wielage had recorded two broadcasts, one Universal and one Disney, after January 1, 1978. All other incidents of copying occurred prior to that date, and these included the recording of five Universal titles by defendant Griffiths; nine Universal and seven Disney by Wielage; two Universal by Soule; one Universal and six Disney by the Lowes; and two Universal by the Birds.

This court finds that this home-use recording is not an infringement under either the Old Act or the New Act. This finding rests on statutory interpretations of both the Old and the New Acts, the legislative history of the New Act, and the doctrine of fair use.

A. *The Old Act*

Section 1 of the Copyright Act, 17 U.S.C. § 1, gave the copyright owner the "exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; . . . ." Under this broad, unqualified language, Betamax recording appears to be an infringing activity. The legislative history does not discuss home-use recording; in 1909, television and its ensuing technology was not even contemplated by Congress.

[1] In applying the Old Act, courts created the fair use doctrine to immunize some forms of copying from the literal implications of the statute. The fair use doctrine is discussed extensively below. This court concludes that home-use copying is fair use. This conclusion is based on the doctrine as it was developed by the courts under the Old Act and left unaltered by the New Act. Therefore, this conclusion applies equally to instances of home-use recording under the Old and New Acts.

B. *The New Act*

[2, 3] Copyright holders have monopoly power only over those uses of their works that Congress has protected through legislation; their rights do not exist independent of Congressional action. The broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works. Legislative history, however, shows that Congress did not intend this broad statement to include reproductions of sound recordings for home use. The central question here is whether Congress intended the same language to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use. Legislative history does not show this intent. On the occasions when the issue was discussed by Congress, all indications were that Congress did not intend to give monopoly power over this use. This legislative history is surveyed below.

Section 106 of the New Act provides:

> § 106. Exclusive rights in copyrighted works
>
> Subject to sections 107 through 118 [17 U.S.C. §§ 107–118], the owner of copyright under this title [17 U.S.C. §§ 101 et seq.] has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Plaintiffs contend that this statutory language is clear. According to them, § 106(1) gives the owner of the copyright an unqualified and exclusive right to "reproduce the copyrighted work in copies or phonorecords." Plaintiffs urge that if Congress had intended to allow home-use copying, it would have made express qualifications as it did in subsections (4) and (5) of § 106.

Defendants respond, and this court agrees, that interpretation of the New Act's language is not that simple. Legislative history must be examined. As the Supreme Court wrote in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9–10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976):

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA [Federal Water Pollution Control Act] in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Assn.*, 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345, 1351 (1940) (footnotes omitted).

The language in § 106 is general and broad. It appears to apply to every situation involving reproduction of a copyrighted work. It does not reflect the specific attention Congress gave to several types of reproduction. As the legislative history shows, Congress did not always draft statutory language to reflect its intent.

In 1955, Congress began revising the Copyright Act of 1909. From 1955 to 1976, the Office of the Register of Copyrights worked with Congress to draft the new legislation and focus issues of concern. Comprehensive revision was a complex and controversial effort. In 1971, the process was impeded by strong disagreement about the treatment of cable television in the revised statutory framework. By the same year, the problem of record piracy had become severe. Relief for this problem was blocked by the dispute over the cable television portions of the revision act. Rather than waiting for complete revision, Congress passed an amendment to the Old Act to deal with sound recording piracy. This amendment became subsection (f) of § 1 of the Old Act and established limited copyright protection for owners of sound recordings. This subsection (f) was not distinct and separate from the comprehensive revision under way in Congress. Its language was lifted from the earlier general revision bills, and it was incorporated virtually verbatim into § 106 *et seq.* of the New Act. As the Librarian of Congress wrote to the Chairman of the Senate Judiciary Committee on January 19, 1971:

> In general, we also support the amendatory language adopted in the bill which *draws heavily upon the language of the bill for general revision of the copyright law (S. 543)* . . .
>
> . . . . .
>
> The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. The revision bill before your committee this past session and which Senator McClellan proposes to reintroduce, has parallel provisions, and if general revision were on the threshold of enactment S. 4592 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 4592 are badly needed now. *Upon enactment of the revision bill, they would, of course, be merged into the larger pattern of the revised statute as a whole.*

S.Rep.No.72, 92d Cong., 1st Sess., 7-8 (1971) (emphasis added).

A comparison of the statutory language shows that the amendment was merged into the New Act. This incorporation is significant because Congress, in passing the legislation, clearly expressed its intent not to restrain home sound recording from broadcasts, tapes or records where the recording is for private, non-commercial use. As the House Report which accompanied the 1971 Amendment stated:

> *Home Recording*
>
> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

H.Rep.No.487, 92d Cong., 1st Sess. 7, *reprinted in* [1971] U.S.Code Cong. & Admin. News, pp. 1566, 1572.

Thus, while the language of § 106 of the New Act appears to give copyright holders exclusive rights over all recordings, the Congressional intent was that home-use sound recording was not prohibited. Holders of copyrights in sound recordings were not to have any "broader rights than are accorded to other copyright proprietors." U.S.Code Cong. & Admin.News 1971, p. 1572. Defendants contend that, as with home-use sound recording, Congress did not intend to protect copyright holders from off-the-air audiovisual recording for home-use, even though the statute does not expressly so state.

The issue of home-use recording was not addressed in any subsequent House or Senate report. The reports accompanying the 1976 general revision legislation did not restate Congressional refusal to give monopoly power over home-use recording, but the language of the 1971 Amendment was incorporated into the New Act without any suggestion that legislative intent had changed.

The 1971 House Report is not the only support for a finding that the Copyright Act does not prohibit home-use recording. Home-use recording from radio and television broadcasts was discussed in committee hearings, floor debates and reports from the Office of Copyrights. Statements from all three sources are relevant to a determination of legislative intent.[1]

In June, 1971, Subcommittee No. 3 of the House Committee on the Judiciary met in hearings on the sound recording amendment. Representative Beister of Pennsylvania engaged in the following dialogue about off-the-air recording with Ms. Barbara Ringer, then Assistant Register of Copyrights:

> MR. BEISTER. I do not know that I can add very much to the questions which you have been asked so far.
>
> I can tell you I must have a small pirate in my own home.
>
> My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, *and this legislation, of course, would not point to his activities, would it?*
>
> MISS RINGER. I think the answer is clearly, "*No, it would not.*"
>
> I have spoken at a couple of seminars on *video cassettes lately, and this question is usually asked: "What about the home recorders?"*
>
> The answer I have given and will give again is that *this is something you cannot control. You simply cannot control it.*

Hearings on S. 646 before the Subcomm. No. 3 of the House Judiciary Comm., 92d Cong., 1st Sess. 22 (June 9 and 10, 1971).

Ms. Ringer proceeded to discuss the problem of unauthorized video recordings finding their way into the market. She recognized that this was a problem which Congress might face in the future but stated that it could not be met by carrying copyright enforcement into the home or by banning devices for off-the-air recording. Her testimony continued:

> But *I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping.*
>
> MR. BEISTER: Secondly, *with respect to video cassettes,* are we approaching an additional problem, *not with respect to private use,* but with respect to public distribution after it has been retrieved over a home set?
>
> MISS RINGER: The answer is very definitely, "yes."
>
> For years the motion picture industry has been faced with bootlegging problems, much of it deriving from the 10 mm prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.
>
> I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? *It is certainly not protectable under the Federal statute.*

Id. pp. 22-23.

When the 1971 Amendment reached the House floor, the question of noncommercial home recording was raised by Representative Kazen of Texas and answered by Representative Kastenmeier. Representative Kastenmeier was chairman of the House Judiciary Subcommittee responsible for the New Act, a sponsor of the general revision legislation, and a member of the Conference Committee which put the New Act in final form. The dialogue was as follows:

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[1] *See Simpson v. United States,* 435 U.S. 6, 13, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978) (statements by committee chairmen and bill sponsors are entitled to great weight); *Zuber v. Allen,* 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969) (departmental construction of its own enabling legislation carries most weight when department administrators participated in drafting and expressed their views to Congress in committee hearings); *First National Bank of Logan v. Walker Bank & Trust Co.,* 385 U.S. 252, 259–60, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966) (statements of committee members may be considered) and *Ideal Farms, Inc. v. Benson,* 288 F.2d 608, 616 (3d Cir. 1961), cert. denied, 372 U.S. 965, 83 S.Ct. 1087, 10 L.Ed.2d 128 (1963) (comments during floor debate by a sponsoring senator may be considered).

> MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that *is duplicated for commercial purposes only*?
>
> MR. KASTENMEIER. Yes.
>
> MR. KAZEN. In other words, if your child were to *record off of a program which comes through the air on* the radio *or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill*?
>
> MR. KASTENMEIER. *This is not included in the bill. I am glad the gentleman raises the point.*
>
> On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for: namely, *this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes.* This is made clear in the report.

117 Cong.Rec. 34, 748 (1971).

Treatment of home-use recording is consistent outside the legislative history, as well. Indeed, since 1955, the Copyright Office of the Library of Congress and the Register of Copyright consistently avoided and even opposed efforts to protect copyright owners against home-use recording.

In 1961, the Office issued a report which urged that private performance of a copyrighted film or motion picture not be restrained. The Register contended that statutory damages for such infringement "would be grossly excessive" and that "private performances could rarely be discovered or controlled." The Register directly confronted the issue of home-use videotape recording:

> New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright.

Copyright Law Revision. Report of the Register of Copyrights (July, 1961), p. 30.

As discussed above, the Copyright Office, through Barbara Ringer, continued to advocate this view throughout the years of legislative revision. The Office was an active participant in drafting, promoting and explaining the legislation for Congress and always maintained that home-use recording is not an infringement.

This position of the Office developed in part from a concern about invasion of the individual's privacy in his home. As Ms. Ringer testified, home recording simply cannot be controlled. Nobody is going into anyone's home to prevent it. The fears of Representatives Beister and Kazen that the legislation would reach their children's activities in their homes were not realized. Of course, not all activity is made legal by virtue of occurring in a private home. Congress can constitutionally legislate against some activity which may occur in the home, but doing so necessarily requires caution. Here, legislative history shows that, in balance, Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home-use recording would create.

C. *Fair Use*

[4] Analysis of whether home-use recording is an infringement cannot end with the statutory language and legislative history. While the Old Act was in effect, courts devised the doctrine of fair use, which creates a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . ." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *quoting* Ball, *Copyright and Literary Prop-*

erty 260 (1966). Fair use has always been a doctrine without rigid definition. "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol v. Nizer,* 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978) (citations omitted).

In this case, new technology has spawned a copyright question of first impression. This court finds that the legislative history of the New Act shows that Congress did not intend to restrain the home-use copying at issue here. Even if this finding were erroneous, the legislative history would be sufficient to raise doubts about the meaning of the statutory language of § 106. This language appears to give copyright holders the exclusive right to reproduce their works in copies or phonorecords. Yet legislative history shows an intent to allow home-use copying of both sound recordings and broadcasted audiovisual material.

In *Twentieth Century Music Corp. v. Aiken, supra,* 422 U.S. at 156, 95 S.Ct. at 2044, the Supreme Court stated that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose." (footnote omitted). The fair use doctrine is a tool for such construction.

The New Act did not change fair use. It did, however, codify the doctrine for the first time and characterize fair use as non-infringement rather than excused infringement. In doing so, both the House and the Senate emphasized that they did not intend to alter the judicial fair use doctrine:

> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.
>
> Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R.Rep.No.1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 5659, 5680; S.Rep.No.473, 94th Cong., 1st Sess. 62 (1975).

As Congress recognized, the doctrine of fair use must be flexible to deal with technological change. It is an equitable tool for balancing competing claims in copyright cases. The Copyright Act gives copyright owners control of only some uses of their works. *Fortnightly Corp. v. United Artists,* 392 U.S. 390, 393-94, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968). The Copyright Act is premised on the belief that the public will benefit when authors are given exclusive rights leading to economic reward and encouragement for continued contribution to the arts and sciences. As H.R.Rep.No.2222, 60th Cong., 2d Sess. 9 (1909), stated about the 1909 Act, copyright is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public."

The public benefit derived from the copyright scheme, however, depends on careful balancing. If an author's exclusive rights over his work were unlimited, his personal economic incentive could surpass what is necessary for encouragement and actually work against the public by decreasing access to these works. The Supreme Court recognized this balancing in *Twentieth Century Music Corp. v. Aiken, supra,* 422 U.S. at 156, 95 S.Ct. at 2044:

> The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in

conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S.Ct. 546, 547, 76 L.Ed. 1010. (citations and footnotes omitted).

Other courts, too, have noted the competing goals of the copyright laws. *See, e. g., Williams & Wilkins v. United States*, 487 F.2d 1345, 1352, 203 Ct.Cl. 74 (1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975): " . . . the development of 'fair use' has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection 'To Promote the Progress of Science and the useful Arts.'" (citation omitted).

One commentator has suggested that the question of fair use arises where the expectations of the author and the public meet.

> [T]he author expects that the copyright scheme itself will sometimes require use of his work necessary in the public interest for which he will not be paid, and society expects that the copyright scheme will either allow such use without reducing the author's incentive or impose no excessive burdens on the public when use is controlled. Put another way, in entrusting their respective interests to the copyright scheme, author and society each takes a risk that the costs to each would not be unacceptable.

L. Seitzer, *Exemptions and Fair Use in Copyright*, at 30 (1978).

[5] The fair use doctrine, as articulated in judicial opinions, is not so concise. The courts have identified four factors for determining fair use. In *Williams & Wilkins*, *supra*, at 1352, these were identified as "(a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work." These same four factors were codified almost verbatim in § 107 of the New Act.

> § 107. Limitations on exclusive rights: Fair use
>
> Notwithstanding the provisions of section 106 [17 U.S.C. § 106], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

This section's language shows that the factors listed are neither exclusive nor required. The factors are illustrative, not definitive. As has been noted, the statute gives no guidance as to the relative weight of the factors and only generally defines the scope of each. 3 *Nimmer on Copyright* § 13.05[A].

Thus, courts are left with great discretion to consider new factors and interpret those codified in new ways. As Congress acknowledged in the House and Senate Reports on the New Act quoted *supra*, such flexibility is necessary in an era of great technological development.

This case invites application of the fair use doctrine to new technology in a new context: off-the-air videotape recording at home for noncommercial home use. While no court has previously addressed this issue, fair use doctrine cases do suggest both an approach and an answer.

The parties' briefing has focused on three cases which illustrate the treatment of fair use in a noncommercial context. Neither these cases nor any others within this court's knowledge, however, discuss copying within a private home using signals beamed over public airwaves.

The three cases addressing fair use in the noncommercial context are *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1963); *Williams & Wilkins v. United States, supra*; and *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243 (W.D.N.Y.1978). Their facts must be reviewed.

In *Wihtol*, a church choir director incorporated the entire copyrighted hymn "My God and I" into a new arrangement which was publicly performed by both a high school and a church choir. The Eighth Circuit found the choir director directly liable for infringement and the employer church liable under the doctrine of *respondeat superior*.

In *Encyclopaedia Britannica*, the district court granted a preliminary injunction to plaintiffs, producers of educational audiovisual works, against defendants, local government officials who would tape plaintiffs' works off-the-air, make copies of them and distribute them to the schools. In granting this preliminary relief, the court held that the fair use defense did not overcome plaintiffs' showing of a *prima facie* case. The court first carefully distinguished *Williams & Wilkins*, discussed *infra*, and then held:

> The scope of BOCES' activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale. BOCES has acquired videotape equipment worth one-half million dollars, uses five to eight full-time personnel to carry out its program, and makes as many as ten thousand tapes per year. For the last twelve years, these tapes have been distributed throughout Erie County to over one hundred separate schools.
>
> Considering all of these factors, I find that the plaintiffs have established a prima facie case entitling them to preliminary relief. As BOCES points out, the applicability of the defense of fair use raises numerous questions of fact which cannot be resolved without a full trial on the merits. At this stage in the proceedings, I find that the substantiality of the copying and the possible impact on the market for education films tip the balance in favor of the plaintiffs, outweighing BOCES' noncommercial, educational purpose in copying the films.

447 F.Supp. at 252.

In *Williams & Wilkins*, the Court of Claims found that copying by the National Institute of Health ("NIH") and the National Library of Medicine ("NLM") of entire articles published in plaintiff's journals was fair use under the Old Act. The court relied on many factors "and not upon any one, or any combination less than all." 487 F.2d 1345 at 1362. While these factors included elements of the traditional four, the court exercised its discretion to consider other factors it deemed relevant to the issue of fair use in the particular factual context.

The court listed eight factors. First, the court noted that NIH and NLM are nonprofit institutions and that with both the libraries and the requesters, "scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication." 487 F.2d at 1354. Second, the court relied on the two-part factor of "a system of limitations" imposed and enforced by the institutions and the "effectiveness of that system to confine the duplication for the personal use of scientific personnel who need the material for their work . . . ." 487 F.2d at 1355. This factor, in the court's view, reduced the significance of the absolute number of copies of an article which must be made. Third, the court found it significant that photocopying had been going on ever since the Copyright Act was adopted with "apparent general acceptance" and asked "whether this marked increase in volume [through improved technology] changes a use which was generally accepted as 'fair' into one which has now become unfair." 487 F.2d at 1356. Fourth, the court was convinced that "medical science would be seriously hurt if such library photocopying were stopped." *Id.* Fifth, the court held that the "record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM." 487 F.2d at 1359. Sixth, the court was reluctant to find infringement because of the "grave uncertainty of the coverage of 'copy' in Section 1 of the 1909 Act . . . " *Id.* The court noted that "this is now preeminently a problem for Congress . . . ." 487 F.2d at 1360. Seventh, the court reviewed legislative reports for revision of the 1909 Act and found it showed that photocopying can be "fair use" in proper circumstances. 487 F.2d at 1361. Finally, the eighth factor which the court found relevant to fair use was that foreign countries have statutes which allow such photocopying. *Id.*

The *Williams & Wilkins* case, affirmed by an evenly divided Supreme Court, has little precedential value. Its holding is specifically limited to its unique factual situation. Furthermore, it has been strongly criticized,[2] with the harshest criticism leveled at the Court's treatment of the harm issue (discussed *infra*). The value of the case lies in its demonstration of the relevance of the fair use doctrine when copyright protection is tested by new technology and noncommercial use.

Wihtol and *Encyclopaedia Britannica* are also of little precedential value. *Wihtol* involved public performance of the copyrighted material. *Encyclopaedia Britannica* is limited because it was an opinion granting only preliminary relief. The court was not conclusively finding infringement but rather only a *prima facie* case thereof. Even if that court had made a final determination on infringement, the case nonetheless would be more dissimilar to the situation here than similar. The most important difference is that it did not involve home-use off-the-air recording but rather "a highly organized and systematic program for reproducing videotapes on a massive scale." 447 F.Supp. at 252.

A comparison of the factual settings in the decided cases with that of the present case reveals two distinguishing factors:

(1) Home-use recording is done by individuals or families in the privacy of their own home for use in their home.

(2) The material copied has been voluntarily sold by the authors for broadcast over the public airwaves to private homes free of charge.

These distinctions narrow the issue before this court. They shape the four factors of the traditional fair use analysis and guide the court in defining appropriate expectations of the copyright holder and the public.

[6] As discussed above, the traditional four factors in determining fair use are listed in § 107 without reference to weight or priority. Several commentators, however, have suggested that fair use cases show that the fourth factor of harm to the copyrighted work is or should be considered first when determining fair use,[3] and the issue of harm has received the most emphasis in this lawsuit. For these reasons, it is discussed first in this analysis of fair use.

1. *Harm*

The Court of Claims in *Williams & Wilkins* found that library photocopying was fair use because ". . . plaintiff has failed to prove its assumption of economic detriment, in the past or potentially for the future. . . . This record simply does not show a serious adverse impact, either on plaintiff or on the owner's potential market for the work. 487 F.2d at 1359. This approach by the Court of Claims has been widely criticized as inappropriate for determining fair use. One of the most forceful criticisms is from Professor Melville Nimmer, who writes that the court confused the issue of harm for purposes of damages with the harm concept in fair use. According to Nimmer, the court should have asked "not whether the particular photocopying activities of the defendant resulted in damages to the plaintiff, but rather whether wholesale photocopying of plaintiffs' journals by any and all libraries and similar institutions would decimate the plaintiffs' potential market." Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. Rev. 1052, 1054 (1975).

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[2] *See, e. g.*, 3 *Nimmer on Copyright* § 13.05[E].

[3] *See, e. g.*, 3 *Nimmer on Copyright* § 13.05[A][4]; Seltzer, *Exemptions and Fair Use, supra*, at 36; Freid, *Fair Use and the New Act*, 22 N.Y.L.S. Rev. 497 (1976-1977); and Comment, *Betamax and Infringement of Television Copyright*, 1977 Duke L.J. 1181, 1209.

[7-9] As in *Williams & Wilkins, supra*, the issue of harm is important in this lawsuit for three determinations: (1) whether the use is fair use, (2) whether an injunction is appropriate, and, (3) assuming infringement, what the damages are. Actual harm may not be essential to any of these three determinations. Without it however, the determinations are much more difficult. It has been suggested that for purposes of fair use, the question should not be what are the past effects but rather what are the probable effects. Freid, *Fair Use and the New Act, supra*, at 505 n. 39. As to the injunction issue, the question is whether any irreparable harm will occur if an injunction is not issued. As will be discussed, this prognostication of irreparable injury is particularly difficult for a court to make when no harm has occurred to date and predictions of future harm are based on personal belief and speculation. The only issue where actual harm is neither necessary nor particularly helpful is the issue of damages. Under both the Old and the New Acts, once infringement is found, statutory damages can be awarded when no actual damages have been proven.

Plaintiffs have admitted that no actual harm to their copyrights has occurred to date. Plaintiffs' experts also admitted that they knew neither the year in which the predicted harm would occur nor the number of Betamax purchases which would cause the harm. Yet they vigorously maintained throughout trial that harm to their copyrights would not only be a probable effect of Betamax usage, but an imminent effect.

The bases for this contention are discussed extensively below in the context of the injunction issue and will not be repeated here. It should be noted, however, that plaintiffs' argument is more complicated and speculative than was the plaintiff's in *Williams & Wilkins*. In *Williams & Wilkins*, the plaintiff asked the court to predict that if many readers obtained a journal article free of charge from the library, the readers would not subscribe to the journal and the plaintiff would be injured. Here, plaintiffs ask the court to find harm based on many more assumptions. Plaintiffs first assume that a large proportion of the 75 million television households in this country will in the near future own the Betamax machine which today costs approximately $875; then they assume that a significantly large number of these Betamax owners will have both the financial ability and the desire to buy many Betamax tapes (today costing approximately $20 each) to record movies and episodes from TV series, and that they will keep these tapes for repeat viewing over many years. They further assume that a viewer will watch these Betamax playbacks at a time when he would otherwise be watching live television. Plaintiffs also assume that even if the tapes were not kept over a long period of time, Betamax owners will still injure the value of their copyrights by deleting commercials from movies and television series. Furthermore, plaintiffs assume that because the Betamax allows more persons to view the original telecast, fewer persons will be in the rerun audience. As is discussed more fully in Part IV *infra*, some of these assumptions are based on neither fact nor experience, and plaintiffs admit that they are to some extent inconsistent and illogical. They surface from a system of marketing which developed because producers and broadcasters could control the time at which the public views materials beamed to them over public airwaves. The Betamax reduces that control, and plaintiffs predict that harm will result.

Because this prediction of harm is based on so many assumptions and on a system of marketing which is rapidly changing, this court is hesitant to identify "probable effects" of home-use copying. Yet even if this factor of the fair use analysis were determined in plaintiffs' favor, it would not render the use unfair. The other three factors, and other considerations which the court finds relevant, must be balanced with the harm.

[10] Before proceeding to a discussion of these factors, the court notes that the extent of the harm which plaintiffs ask the court to assume is probable is unclear. Harm which "imperils the existence of a publication" is more destructive of a fair use defense than is harm which would "limit profits." *See* Freid, *Fair Use and the New Act*, *supra*, at 509 n. 53. Plaintiffs' experts have testified that if Betamax is not enjoined, their profits will decrease, and that for some programs, they may not recoup their production costs. If this happens, plaintiffs warn, they will have to reduce the quality, or at least the production costs, of their audiovisual works. Plaintiffs have not said that they will no longer be able to produce this material. Indeed it would be difficult for these plaintiffs to so contend. Their profits have increased yearly, including the years in which VTR technology was introduced and growing. They exploit their material in many ways other than free television. Networks pay them substantial sums of money for their product before it even reaches the television viewer who copies it. Of course, plaintiffs claim that this copying indirectly reduces the revenue by affecting ratings and advertising. If this is true, plaintiffs have marketing alternatives at hand to recoup some of that predicted loss. They stand ready to make their product available in cassettes and compete with the VTR industry. They have proven resilient to change in market practices arising from other technological inventions, *e. g.*, cable television, pay television.

It is true, however, that copyright holders in the television industry have come to expect substantial financial reward. They are entitled to reap the highest profit they can within the industry. The Betamax and other technological advances will undoubtedly change the industry and introduce new considerations into plaintiffs' marketing considerations.

[11, 12] Copyright law, however, does not protect authors from change or new considerations in the marketing of their products. As the Supreme Court stated in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*: "While securing compensation to the holders of copyright was an essential purpose of that Act, freezing existing economic arrangements for doing so was not." 415 U.S. 394, 414 n. 15, 94 S.Ct. 1129, 1140, 39 L.Ed.2d 415 (1974). In any event, any harm which might be possible must be weighed with other fair use factors.

2. *Nature of the Material*

This factor has not been discussed extensively in fair use cases. In *Rosemont Enterprises, Inc.*, *supra*, at 307, the court asked whether the nature was such that "distribution would serve the public interest in the free dissemination of information." In *Williams & Wilkins*, *supra*, at 1356, the court found that the materials were necessary to the development of medical science. The Senate Report accompanying the New Act, S.Rep.No.473, *supra*, suggests that the use of a news article would be judged differently from the use of a musical composition and that reproduction of material which is usually unavailable would be more justifiable than reproduction of readily available material.

The material at the heart of this lawsuit cannot be categorized as "scientific" or "educational." This court cannot, nor would it desire to, pronounce the "New Mickey Mouse Club" episode which the court viewed at trial to be "mere entertainment," or "educational," or "informational," or "beneficial." As the Supreme Court wrote in *Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969), "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."

Inability to draw these lines does not leave this court without guidance on this factor, however. The most important aspect of the "nature" of the materials involved here is one that courts examining fair use in other media have not had to confront. This case involves only that copyrighted material which plaintiffs voluntarily choose to have telecast over public airwaves to individual homes free of charge. Plaintiffs are not paid for this material by the viewers. While the audience does not pay directly for the programs, however, this telecast is not a gratuity from the plaintiffs. They are paid for the program by the broadcaster at a rate sometimes below production costs and sometimes above. As the Supreme Court discussed in *Teleprompter, supra*, the payment process distinguishes the copyright owner in the television industry *from* most others:

> Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material—that is, the television viewers—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.

415 U.S. at 411-12, 94 S.Ct. at 1139-40 (footnote omitted).

The direct payment from broadcasters and advertisers has made the "free" offering to the public very profitable for plaintiffs. The opportunity to use the public airwaves allows plaintiffs to disseminate their works more widely than they ever could on their own.

This characteristic of the material is significant because of its interaction with the issue of harm. Because plaintiffs derive their revenues only indirectly from the alleged infringers of their work, the harm resulting from the infringement is more speculative. This has been discussed briefly above and will be addressed more extensively in Part IV.

3. *Purpose of Use*

[13] Courts have traditionally applied this factor by asking whether the copyrighted material is used for criticism, research or other independent work. *See, e. g., Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F.Supp. 376, 384 (D.Conn.1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976); *Loew's Incorporated v. Columbia Broadcasting System*, 131 F.Supp. 165, 173 (S.D.Cal.1955), *aff'd sub nom., Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958). Plaintiffs contend that in this case there is no independent use. Betamax owners use the copy for the same purpose as the original. They add nothing of their own.

While this is true, application of this factor is not so limited. Section 106 of the New Act does not require this line of interpretation. Congress did not require independent use when finding home use sound recording to be fair use.

The salient characteristics of the use here are that it is noncommercial and in the home. Plaintiffs correctly point out that noncommercial use does not mean fair use. This is true, just as commercial use does not automatically bar fair use. *Meeropol v. Nizer, supra*, at 1069; *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, at 307. The noncommercial nature of the use here, however, does broaden the scope of the doctrine. *Loew's Incorporated v. Columbia Broadcasting System, supra,* 131 F.Supp. at 175.

Here, the use is not only noncommercial but also private. This lawsuit concerns individuals in their homes copying material to view at a later time in their homes. At issue is not whether they can take the copy to the church or school and show it to a larger group. What this court rules on is home noncommercial use.

The purpose of this use is to increase access to the material plaintiffs choose to broadcast. This increase in access is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves. *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 102, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). This access is not just a matter of convenience, as plaintiffs have suggested. Access has been limited not simply by inconvenience but by the basic need to work. Access to the better program has also been limited by the competitive practice of counterprogramming.

Betamax owners use plaintiffs' works noncommercially and privately. This use increases the owners' access to material voluntarily broadcast to them free of charge over public airwaves. Because the use occurs within private homes, enforcement of a prohibition would be highly intrusive and practically impossible. Such intrusion is particularly unwarranted when plaintiffs themselves choose to beam their programs into these homes.

4. *Substantiality*

The fourth traditional fair use factor is the "substantiality" of the use. Generally, the more substantial the taking from the copyrighted work, the less likely it is that the fair use defense will be available. Like the other variables in the fair use analysis, the substantiality factor is inextricably bound with the issue of harm. Obviously, in the normal case of copying, the effect that the infringing copy has on the market for the original will depend to a large extent on whether the copy can substitute for the original. As Professor Nimmer has written:

> [I]ncorporating substantially all of a short story in what purports to be a literary criticism of the story will serve to fulfill the needs of those who wish to read the story as well as those who merely wish to study the reviewer's criticism. The same result is not as clear, but arguably pertains in the *Gaslight* case [*Benny v. Loew's, Inc., supra,* discussed *infra.*] That is, those who saw the Jack Benny burlesque not only enjoyed his parody, but also became rather fully familiar with the serious underlying story so that they might not thereafter wish to see the plaintiff's original work.

3 *Nimmer on Copyright* § 13.05[D].

[14] Home use recording off-the-air usually involves copying the entire work. This fact, however, does not defeat the defense of fair use, because all factors must be taken together.[4] When considered with the nature of the material and the noncommercial private use, this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for "plaintiff's original work."

Plaintiffs contend that the fair use defense is barred in this case by the substantiality factor. They rely on *Walt Disney*

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[4] As one commentator has concluded:

> Too rigid an application of the substantiality criterion . . . would severely limit dissemination of copyrighted works by new technologies. . . . Indeed, to aid research and education, certain applications of these technologies have been statutorily recognized as fair use. [*See* 17 U.S.C. § 108(a)].

Note, *Home Videorecording: Fair Use or Infringement?,* 52 S.Cal.L.Rev. 573, 608 (1979) (citations omitted).

Of course, the spread of new technologies poses significant risks for copyright owners, and wholesale reproduction will, in many instances, limit the market for the original work. 3 *Nimmer on Copyright* § 13.05[E]. When that is the case, substantiality of the taking will combine with harm to preclude a fair use defense.

Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979), where the court found that the defendants' admitted copying of Disney cartoon characters for use in adult comic books constituted infringement, and on *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966); and *Benny v. Loew's Inc., supra*. It is true that, taken out of context, dicta in *Meeropol* and *Rosemont* appear to preclude resort to a fair use defense when copying is nearly verbatim, but the context of the dicta reveals that the Second Circuit was concerned about substantiality only when it produced harm to the complaining party.

The *Air Pirates* case was a parody case and discussed fair use standards for parodies which, "like the standards for applying fair use in other contexts, have been a source of considerable attention and dispute." 581 F.2d at 756. Specifically, the court reviewed the substantiality test used in *Benny v. Loew's Inc., supra*, another parody case in which Jack Benny's television parody of Metro-Goldwyn-Mayer's "Gas Light" was held to be an infringement. The court interpreted the *Benny* case as establishing a threshold substantiality test for the fair use defense in a parody case, then applied this threshold test to the parody before them and affirmed the district court's summary judgment of infringement.[5]

In addition to *Benny*, the *Air Pirates* court cites *Walt Disney Productions v. Mature Pictures Corp.*, 389 F.Supp. 1397 (S.D.N.Y.1975), and *Berlin v. E. C. Publications*, 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964), as support for the threshold substantiality test. Both of these are parody cases. The court also cites *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937). *Leon* was not a parody case, but it discussed the substantiality issue only as to copying *and publication* of copyrighted material:

> It is not necessary in the case before us to discuss generally the question of what constitutes "fair use." Obviously, every publication copyrighted admits of many uses which do not constitute infringement. Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.

91 F.2d at 486.

The present proceeding is not a parody case, and, since there has been no distribution, there has been no publication. 17 U.S.C. § 101. The underlying rationale for the threshold substantiality test as discussed in the above cases is, therefore, not applicable here. The issue before this court is not what degree of copying is necessary to "recall or conjure up" the object of a satire as it was in *Air Pirates*. Nor is the issue whether "wholesale copying and publication" is one of the "many uses [of copyrighted works] which do not constitute infringement." *Leon, supra,* 91 F.2d at 486.

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[5] The court observed:

> The language in *Benny* concerning the substantiality of copying can be given a reading much more in keeping with the context of that case and the established principles at the time of that case if the opinion is understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. *Accord*, 2 *Nimmer on Copyright* § 143. It was an established principle at the time of *Benny* that such verbatim copying precluded resort to the fair use defense. *See, e. g., Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937).

Walt Disney v. Air Pirates, supra, at 756 (footnote omitted). (*Leon*, as noted *infra* in the text of this opinion, is distinguishable from the case before this court because it involved commercial distribution of the infringing materials.)

The *Air Pirates* court concluded its discussion of the substantiality factor as follows:

> Thus *Benny* should stand only as a threshold test that eliminates near-verbatim copying. In the absence of near-verbatim copying, other courts have analyzed the substantiality of copying by a parodist by asking whether the parodist has appropriated a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire. *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), certiorari denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33; see *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D.Cal. 1955).[13]
>
> [13] In so construing *Benny*, we necessarily disagree with its dictum that a parody is treated no differently than any other taking. See *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), certiorari denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33.

Walt Disney v. Air Pirates, supra, at 757, 757 n. 13.

Section 107 of the New Act states that in determining whether the use made of a work in any particular case is a fair use, the factors considered shall include the traditional four. Substantiality is simply listed as one of these factors; it is given no special position in relation to the others. In codifying the fair use doctrine, Congress recognized that there are no simple rules which can be applied as to all cases. As H.Rep.No.1476, *supra,* at 5679, stated:

> Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

In the unique factual context of this case, the guidance offered in § 107 is followed: all four factors are considered, as well as other criteria relevant to balancing the equities between the parties, and no element is given preclusive effect.

5. *Additional Considerations*

This case, which arises from a new technology, is one of first impression. No earlier copyright case addresses the issues raised here. The traditional four factors have not been applied to this type of fact situation.

Congress expressly left the fair use doctrine flexible because it recognized the possibility of such a situation. The doctrine is particularly useful in evaluating new technology and its effect on copyright law. As the House and Senate Reports quoted above note, the doctrine is especially important "during a period of rapid technological change," and "the courts must be free to adapt the doctrine to particular situations on a case by case basis."

[15, 16] Accordingly, this court finds that the home-use copying made possible by this new technology constitutes fair use of plaintiffs' works. The use, limited to home recording and playback of audiovisual material broadcast free of charge to Betamax owners over public airwaves, is noncommercial and does not reduce the market for plaintiffs' works.

II. *RECORDING BY RETAIL DEFENDANTS*

The central focus of this lawsuit has been home-use recording. Plaintiffs also contend, however, that retail stores infringe copyrights (1) when they record segments of plaintiffs' shows off-the-air, and (2) when they play these recordings back for the purpose of demonstrating the Betamax to potential purchasers. Specifically, plaintiffs allege that defendants Carter Hawley, Federated/Bullock's, Associated/Robinson's and Henry's Camera have infringed certain copyrights.

The facts supporting these allegations are weak. As discussed *supra,* all copying by the retail defendants was made at the request of Paul Ruid, a private investigator retained by plaintiffs' law firm. While Ruid did not request a specific program for taping or a specific length of recording, he did pose as a potential customer and request a demonstration of Betamax capabilities. At best the evidence shows that in response to this request, Broadway copied an 8-minute segment of "Adam 12" (Universal) and a 15-minute segment of a "Major Adams" (Universal) episode, and that Associated/Robinson's made two 8-minute recordings of the "Gemini Man" (Universal). It was not established at trial that Bullock's had succeeded in making any recording (Ruid never saw a playback of the alleged recording from "Captains and the Kings") and there was no testimony about recording by Henry's Camera.

The retail stores defend their actions on two grounds: (1) any infringement which may have occurred was induced and encouraged by plaintiffs, and, therefore, principles of equity bar suit on these actions; and (2) such copying is fair use.

Plaintiffs' claims against retail stores for their demonstrations are novel. There is no precedent for suing retail stores for displaying public televisions tuned to copyrighted programs, and plaintiffs do not complain here about this aspect of the retail defendants' activity.

[17] Without deciding whether Ruid sufficiently "encouraged" activity so as to bar this suit, this court finds there has been no infringement. The retail stores' use of plaintiff Universal's product as presented in this suit is fair use.

Universal admits that no harm has resulted from the retail defendants' copying and playback of Universal products. Furthermore, Universal does not predict any future harm from the copying itself. The underlying concern is not about the copying by the stores but rather about the sales of Betamax. Universal sues the retail defendants because it believes that the stores are liable for contributory infringement by virtue of the subsequent sale of the machine. As Sidney Sheinberg, president and chief operating officer of MCA, testified, Universal would not bring the retail defendants into court to challenge the demonstration copying if there were no sales.

Demonstration copying and playback do not compete in any way with plaintiffs' products. The stores do not record and play back entire shows. The testimony does not show any librarying by the retail stores or any intent to use or profit from the copyrighted works. The only intent is to demonstrate the machine. For these reasons, the court finds that the demonstration copying of these retail defendants is fair use.

This cause of action against the retail stores is without precedent. There has been no suit to challenge photocopying to demonstrate a photocopier; playing a record to demonstrate a stereo system; or recording off a radio to demonstrate a recorder. The only damage claimed by Universal is that the demonstrations give an "imprimatur of acceptance" to copying off-the-air. As already discussed, this court finds that home-use copying is acceptable. In any event, this imprimatur is insufficient to render the retail defendants' demonstration use unfair.

Plaintiffs' claim that the sale of the machines constitutes contributory infringement is discussed below.

III. *LIABILITY OF THE CORPORATE DEFENDANTS*

[18] Even if this court were to hold that home-use copying is an infringement under the Old and New Acts and is not fair use, the court could not find defendants Sonam, Sony, DDBI and the retail stores liable for this infringement. Plaintiffs contend that these defendants are liable under any of three theories: (a) direct infringement, (b) contributory infringement and (c) vicarious liability. This court cannot find any of the corporate defendants liable on any of these theories.

A. *Direct Infringement*

Plaintiffs contend that Sony and Sonam are liable as direct infringers for the copying done by Betamax owners because they furnished the instrumentality for the allegedly infringing activity and they knew and expected that the major use of Betamax would be to record copyrighted material off-the-air, including motion pictures owned by Universal and Disney. To support this contention, plaintiffs cite deposition testimony from Sonam executives and DDBI memos and advertisements which plaintiffs claim show expectation and encouragement of the recording of copyrighted material. Plaintiffs emphasize that DDBI knew of this potential copyright infringement and successfully sought from Sony an indemnity agreement.

To support a finding of direct infringement from this evidence, plaintiffs cite *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 32 S.Ct. 20, 56 L.Ed. 92 (1911); *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F.Supp. 821 (E.D.N.Y.1973); and *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947). While the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn, it appears from the courts' discussions of direct infringement in these three cases that plaintiffs' evidence here does not prove direct infringement. The involvement of the defendants in the infringing activity discussed in these cases was much more substantial and direct than that alleged against defendants here.

It is true that one can be found to have infringed directly even without participating in the actual infringing activity. In *Kalem*, a film producer was found liable for infringement through public exhibition of a film even though third persons had actually exhibited the film. There, however, the defendant-producer had not only advertised that the film could be used for public exhibition but had actually produced the infringing film, which contained scenes from the book "Ben Hur." The court found that public exhibition of this film infringed the book's copyright, and the film producer was held liable.

Elektra, the most recent case relied on by plaintiffs, is completely distinguishable. Not only did it not involve home use recording, but it expressly distinguished such recording. Defendants operated a store where they (1) sold blank tapes; (2) maintained on their premises a coin-operated machine ("Make-A-Tape") which could duplicate onto blank tapes from prerecorded tapes; and (3) loaned purchasers of blank tapes prerecorded copyrighted works for duplication on the Make-A-Tape machine. There was even some suggestion at trial that the defendants directly assisted in the duplication.

The court found that defendants' Make-A-Tape operation "clearly evidences their commercial exploitation . . . for profit in derogation of plaintiffs' rights of exclusive publication." 360 F.Supp. at 823 (footnote omitted).

One of the defenses in *Elektra* was that the "individual and self-service nature" of Make-A-Tape duplication made it analogous to home recording for home use. The court expressly rejected this argument:

> That exception [home recording] does not cover situations where the copying is done for the "purpose of reproducing or otherwise capitalizing commercially on it." House Report No. 92–487, U.S.Code Cong. & Admin.News, *supra* at p. 1572. The facts of record here bespeak commercial exploitation and nothing else. In lending the copyrighted sound recording to the customer without charge, in selling the less costly blank tape from which the spurious but exact copy may be made, and in providing the equipment whereby it may be speedily done at minimal cost, defendants are engaging in mass piracy on a custom basis. To view this activity as a form of "home recording" would stretch imagination to the snapping point. To refuse to protect plaintiffs' exclusive reproduction and publication rights in such circumstances would defeat the very purpose of the sound recording amendment and nullify the intent of Congress.

360 F.Supp. at 824–25.

This statement by the *Elektra* court highlights why the case has little precedential value for this decision. Defendants Sony and Sonam manufacture and market the Betamax and blank tapes. They do not, however, loan or otherwise provide the copyrighted work. Rather, copyright owners sell their works for broadcast to the public free of charge over public airwaves. The copying occurs not in a store operated and managed by the defendants but rather in a person's home, a location in which individual privacy is constitutionally protected and over which defendants have no control. Furthermore, defendants' acts of selling the Betamax and blank tapes to consumers can easily lead to noninfringing uses. In *Elektra*, the intent to infringe was clear: the prerecorded tapes were momentarily loaned to purchasers of blank tapes specifically for use in the store on the Make-A-Tape machine.

The videotape recorder, like a tape recorder, is a staple item of commerce. Its uses are varied. As Justice Holmes recognized in *Kalem*, "[i]n some cases where an ordinary article of commerce is sold nic questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer." 222 U.S. at 62, 32 S.Ct. at 21. Nice questions do arise here. Defendants have provided the public with a machine capable of recording off-the-air. In *Kalem*, manufacturers of the film and the camera used to make the infringing dramatization of "Ben Hur" were not sued; nor was the manufacturer of the Make-A-Tape machine in *Elektra*. There is no precedent for finding the corporate defendants here liable for direct infringement.

The *Harold Lloyd* case relied on by plaintiffs primarily discusses contributory infringement, not direct infringement, and is addressed below.

B. *Contributory Infringement*

The Second Circuit has offered the most clear definition of contributory infringement:

> [O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a "contributory" infringer.

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

Plaintiffs rely on the same factual allegations discussed above to support a finding of contributory infringement: the manufacture, advertising, demonstration and sale of Betamax causes, induces or, at the very least, encourages, furthers or materially contributes to the unauthorized recording of copyrighted motion pictures. According to plaintiffs, that is the primary use for which Betamax is designed and marketed and which defendants encourage in their ads and brochures. In addition, plaintiffs' witnesses testified at trial that while off-the-air recording was possible with machines available prior to Betamax, Betamax was the first compact, affordable consumer item.

In rebutting allegations of contributory infringement, defendants repeat their argument that a manufacturer of a staple article of commerce cannot be held liable for infringement by purchasers of that product. As to the advertising, defendants correctly note that there was no evidence at trial that any advertisements or other statements by defendants in any way induced or caused to be made any of the copies at issue. As to the retail defendants, Henry's Camera was the only one that sold a Betamax to any of the owners discussed in this suit. Henry's Camera sold a 7200 to William Griffith's sons. Griffith testified, however, that he never talked to anyone at Henry's Camera about the Betamax in any respect.

Defendants further contend that the essential element of "knowledge of the infringing activity" is missing. Plaintiffs assert that, while defendants may not have known that specific titles were being copied or that this would be illegal, they did know that the main use of the Betamax would be to record copyrighted works off-the-air and that such recording is a copyright infringement. Plaintiffs cite deposition testimony of Sony executives to support this finding of knowledge. Defendants respond that the opinions expressed in these depositions were ones held prior to 1975. These opinions changed and Sony did not place a warning plate on the back of the Betamax as it had done with earlier VTRs and did not include a warning in Betamax advertisements. Furthermore, they cite the 1977 opinion of this court that "to say that use either is or is not illegal is simply not yet true." *Universal City Studios v. Sony Corp. of America*, 429 F.Supp. 407, 410 (C.D.Cal. 1977).

This court agrees with defendants that their knowledge was insufficient to make them contributory infringers. In the contributory infringement cases cited by plaintiffs, the requisite knowledge is greater than that possessed by the corporate defendants here.

In the *Gershwin* case, *supra*, the court found a concert artists' managing company to be a contributory infringer because the management company knew that the artists were performing copyrighted works and would not secure a copyright license, and yet it helped to form and direct an artists' association and create an audience for them.

In discussing contributory infringement, the *Gershwin* court cited *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399 (S.D.N.Y.1966) ("Screen Gems I"). There the court focused on the manufacture and sale of records which reproduced musical compositions without compliance with the statutory compulsory license provision. Plaintiffs—owners of the infringed copyrights—sued (1) the advertising agency which created ads for the records and purchased time from a radio station; (2) the owner and operator of the radio station; and (3) the agency which packaged and mailed the records. These defendants moved for summary judgment. The court denied this motion, finding that there were issues of fact as to whether each had either actual or constructive knowledge of the infringement and, if so, whether each could be "held liable as one who knowingly participated in or furthered the tortious conduct." 256 F.Supp. at 404 (footnote omitted).

Two of the defendants—the radio station and the packager—subsequently settled. The advertising agency went to trial. The court found that the work performed for the infringer by the advertising agency was "a participation in and a furtherance of their infringement of plaintiffs' copyrights" and then focused on whether the agency had engaged in this work with the knowledge that its clients were infringers. 327 F.Supp. 788, 791 (S.D.N.Y.1971) ("Screen Gems II"). The court found that the agency employee who handled the account was "a knowing party to the piracy. His knowledge binds his employer." 327 F.Supp. at 792.

In *Universal Pictures Co. v. Harold Lloyd Corp., supra*, the writer for an infringing motion picture photoplay was found to be a contributory infringer because he had selected the material for the photoplay knowing that it had been used in another picture.

Here, no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air. Henry's Camera sold the Betamax to Griffiths' sons, but no testimony shows that the store or its employees knew that Griffiths would record copyrighted works.

Plaintiffs assert, however, that these defendants knew it was likely that people would use the Betamax to record copyrighted works and that this constitutes constructive knowledge. Even assuming that such probability were both accurate and sufficient to create "constructive knowledge" of the recording of copyrighted works, these defendants could not know that this was an infringing activity. Unlike the management agency which knew that the artists would not get a copyright license or the advertising agency whose employee knew that records were being made without paying a compulsory license fee, defendants here could not know what copyright law required. Before this lawsuit, that issue had not been determined. As discussed above, this court finds that home use recording is not an infringement. Even if this finding were incorrect, defendants could not be held responsible for knowing otherwise.

It is also doubtful that these defendants have met the other requirement for contributory infringement: inducement or material contribution to the infringing activity. Plaintiffs contend that Sony, Sonam, DDBI and Henry's Camera through advertising "induced" the infringing activities of recording copyrighted shows and librarying. As discussed above, Sony (through DDBI) and Henry's Camera did advertise the use of Betamax for recording favorite shows and compiling a library. Once again, however, there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by these advertisements.

Plaintiffs' claims are unprecedented. Unlike the defendant in *Gershwin*, defendants here do not arrange for and direct the programming for the infringing activity. Unlike the defendants in *Screen Gems I* and *II*, defendants here do not sell or advertise the infringing work. Plaintiffs sue defendants because they manufacture, distribute, advertise and sell a product capable of a variety of uses, some of them allegedly infringing.

Selling a staple article of commerce—e. g., a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of "contribution," if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.

In patent law, manufacturers, distributors, retailers and advertisers of staple articles of commerce suitable for substantial noninfringing use cannot be held liable as contributory infringers. *See* 35 U.S.C. § 271(c); *Aro Manufacturing Co. v. Convertible Top Co.*, 377 U.S. 476, 488–89, 84 S.Ct. 1526, 12 L.Ed.2d 457 (1964); *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48, 32 S.Ct. 364, 56 L.Ed. 645 (1912). As the Court in *Henry* noted, to hold otherwise would "block the wheels of commerce." *Id.*

Whether or not patent law has precedential value for copyright law and the Betamax is capable of "substantial" noninfringing use, the underlying rationale for the patent rule is significant. Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they "constructively" knew that some purchasers on some occasions would use their product for a purpose which a court later deemed, as a matter of first impression, to be an infringement.

C. *Vicarious Liability*

Screen Gems I, supra, and *Gershwin* discussed vicarious liability as well as contributory infringement. As the *Gershwin* court noted, the roots of vicarious liability lie in the doctrine of *respondeat superior*: an employer is liable for the actions of his agent. Vicarious liability for copyright infringement is not dependent on an employer-employee relationship. Vicarious liability can be imposed when a party has the "right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Gershwin*, 443 F.2d at 1162. *Accord, Screen Gems I*, 256 F.Supp. at 402. Here defendants have neither the right nor the ability to control Betamax purchasers' use of the machines in their homes, and any financial benefit is derived from use of the machine whether or not this use is infringing.

In *Gershwin*, the court found that while the management company had no formal power to police the artists' association, it participated pervasively in the direction of the association and its programming, and the association depended on it for direction "in matters such as this." 443 F.2d at 1163. With these facts, the court found that the management company was in a position to police the artists.

In *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963), the court never used the term "vicarious liability" but did discuss *respondeat superior* in the context of copyright infringement. Drawing an analogy to cases where a dance hall's management was found liable for infringing music performed by the bands it hired, the court found that a chain store owner was liable for the sale of infringing record albums by a concessionaire within its store. There the store owner retained the ultimate right of supervision over the record concession and took a proportionate share of the sale of the infringing records.

In *Chess Music, Inc. v. Sipe*, 442 F.Supp. 1184 (D.Minn.1977), a tavern owner was found vicariously liable for the infringing performances of the live bands he hired. The court held that the owner "is deemed to have acquiesced in the musicians' performance as he allowed the musicians the discretion to select the performance." 442 F.Supp. at 1185.

Plaintiffs contend that defendants have similar power to supervise home recording of copyrighted works. They suggest that defendants could develop a jamming system to prevent recording of anything copyrighted. Whether or not such jamming is technologically feasible, this "supervision" would not be within the power of these defendants. A jamming system would most likely require the cooperation of many others: broadcasters, producers and perhaps the Federal Communications Commission.

Plaintiffs also assert that defendants could remove the tuner from the Betamax and thereby make it impossible to record off-the-air. Even if defendants were required to do this, however, an outboard tuner could be purchased separately.

The most effective way for defendants to control the recording of copyrighted audiovisual work is to stop selling the Betamax. Plaintiffs, however, have cited no case in which a defendant's "power to supervise" was based on his ability to terminate the business.

The second requirement, financial benefit, may also be absent here. In *Shapiro* and *Screen Gems I* and *II*, the infringing records benefited the defendants directly; they received a share of the revenue from the sales. In *Gershwin*, the management company received a fee for its assistance in programming and arranging the artists' performances. Here, defendants do not profit from the infringing activity directly. They receive financial benefit from the sale of tapes, regardless of their subsequent use. They benefit directly from the allegedly infringing use only if they sell more because that use is available.

Plaintiffs urge expansive interpretations of the vicarious liability requirements. They contend that Sony has power to supervise because it could refuse to sell the Betamax and that Sony benefits financially from the infringement because some persons would not buy the Betamax if they could not record copyrighted works. With these interpretations, plaintiffs expand the doctrine beyond precedent and, potentially, bring many manufacturers, advertisers and retailers into the net of vicarious liability. For example, manufacturers of cameras could supervise infringers by not selling cameras; and they benefit financially from the sale of the camera to the infringers. Manufacturers of photocopying machines could supervise infringers by not selling photocopiers; and they benefit from the sale of the machine to the infringers. Vicarious liability has not been extended so far, and the facts of this case do not merit such an extension.

In addressing the issue of liability for performance of copyrighted works, H.R. Rep.No.1476, *supra*, set the following standard:

> To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance.

H.R.Rep.No.1476, *supra*, at 159–60; [1976] U.S.Code Cong. & Admin.News, pp. 5775–76.

While this section of the House Report addresses performances and not copying, it does suggest reasonable limitations for vicarious liability in general and aids this court in interpreting the performance cases (*Gershwin, Chess Music*) on which plaintiffs rely.

Defendants are outside both the scope of these limitations and all previous application of the doctrine of vicarious liability. Their participation in and benefit from home recording of copyrighted works would not be sufficient to make them vicariously liable if this activity, contrary to this court's finding in Part I, were deemed to be an infringement.

IV. *STATE CAUSES OF ACTION*

[19] Plaintiffs contend that if home use copying is an infringement, all corporate defendants are liable for unfair competition and fraudulent business practices in violation of California Civil Code § 3369 and California Business and Professional Code

§ 17500. They maintain that the corporate defendants are liable because (a) their advertising of the Betamax unfairly misleads the public to believe that copying off-the-air is legal, and (b) the Betamax diverts viewers from watching plaintiffs' shows on live television and in movie theaters.

The cases on which plaintiffs rely do not support their cause of action against these defendants. In both *People v. Wahl*, 39 Cal.App.2d Supp. 771, 100 P.2d 550 (1940) and *Chern v. Bank of America*, 15 Cal.3d 866, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976), the defendants misrepresented facts in their dealings with the public. Here, defendants' advertisements, even assuming that they gave the impression of legality, did not misrepresent any fact within the knowledge of the defendants. Before this lawsuit, it was not fact that home-use copying of copyrighted works constituted infringement; of course, as discussed in Part I, it is still not fact.

Plaintiffs' second contention as to unfair competition also fails. By the time of trial, Betamax had caused no measurable decrease in the live television or movie audience for plaintiffs' works and, as discussed in Part IV, the evidence does not show a likelihood of such a decrease.

Plaintiffs also alleged that defendants have intentionally interfered with their contractual and advantageous business relationships with networks and independent television stations. Yet they admit that to date no contract has been breached and no damage has been suffered. The elements for interference with contractual relations have not been proven. *See Charles C. Chapman Building Co. v. California Mart*, 2 Cal.App.3d 846, 858, 82 Cal.Rptr. 830 (1969).

Plaintiffs have also not proven any interference with advantageous business relationships. Once again, they admitted at the time of trial that there had been no measurable loss of profits or damage suffered because of Betamax. "[I]t is essential to a cause of action for unlawful interference with business that it appeared that, except for the tortious interference of the defendant, there was a reasonable probability that plaintiff would have entered into a contract or would have made a profit." *Wilson v. Loew's, Inc.*, 142 Cal.App.2d 183, 192, 298 P.2d 152, 159 (1956).

Defendants contend that these state causes of action are preempted by federal copyright law. Since this court finds that no state cause of action has been proven, there is no ruling on the preemption issue.

V. INJUNCTIVE RELIEF

Plaintiffs seek injunctive relief. They ask the court to exercise its equitable powers to restrain defendants from manufacturing, distributing, selling or offering for sale Betamax or Betamax tapes; from using Betamax or Betamax tapes to copy motion pictures owned and copyrighted by plaintiffs; from advertising that Betamax and Betamax tapes may be used for the purpose of making copies of television shows, including motion pictures owned and copyrighted by plaintiffs; and from exhibiting or playing all videotape copies made by defendants of motion pictures owned and copyrighted by plaintiffs. Plaintiffs have suggested alternatively that the court require Sony to modify the Betamax to render it incapable of recording copyrighted works off the air.

An injunction is an equitable remedy. Its issuance is a matter of court discretion. As the Court recognized in *Hecht v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), "We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The historic injunctive process was designed to deter, not to punish." 321 U.S. at 329, 64 S.Ct. at 591–92.

There are no rigid rules to instruct courts when to issue injunctions. An injunction is never a matter of absolute right. As the Supreme Court recently stated in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193, 98 S.Ct. 2279, 2301, 57 L.Ed.2d 117 (1978):

> It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.

As a general matter it may be said that "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." D. Dobbs, Remedies 52 (1973).

An injunction is a harsh and drastic remedy. *Kass v. Arden-Mayfair, Inc.*, 431 F.Supp. 1037 (C.D.Cal.1977). Courts have recognized:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction . . . . The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it.

Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18, International Typographical Union, 471 F.2d 872, 876 (6th Cir. 1972), *quoting* 3 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) § 1431.

This is a doubtful case. An injunction would deprive the public of a new technology capable of noninfringing uses (see *infra*). Furthermore, the need for an injunction is not clear.

Courts look for irreparable harm to the plaintiff before issuing injunctive relief, and here plaintiffs' fears of irreparable harm are speculative at best. Plaintiffs contend that if the court finds that copyright infringement has occurred, irreparable harm is presumed, and it becomes defendants' burden to prove that further harm will not occur in the future.

The bulk of this opinion has been addressed to this court's reasons for finding that home-use copying does not constitute infringement. Even if the court had concluded otherwise, however, it would not find an injunction appropriate.

It is true that courts have acknowledged that actual harm from copyright infringement is very difficult to prove, and, "in the ordinary case," irreparable harm is presumed when the copyright holder's "right to the exclusive use of the copyrighted material is invaded." *American Metropolitan Enterprises of New York, Inc. v. Warner Brothers Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968). Plaintiffs claim that no court has ever refused to grant a permanent injunction in a copyright case when infringement has been proven, even when there has been no evidence of harm. Plaintiffs cite *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964) (direct infringer permanently enjoined); *Big Sky Music v. Todd*, 388 F.Supp. 498 (S.D.Ga.1974) (injunction against owner and operator of nightclub for copyright infringement by live bands performing in the club); *Fisher-Price Toys, Division of Quaker Oats Co. v. My-Toy Co., Inc.*, 385 F.Supp. 218 (S.D.N.Y.1974) (direct infringer permanently enjoined); *Shapiro, Bernstein & Co., Inc. v. "Log Cabin Club Association,"* 365 F.Supp. 325, 328 (N.D.W.Va.1973) (injunction against president and manager of association for musical copyright infringements occurring in club operated by association); *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 188 F.Supp. 235, 238 (S.D.N.Y.1960) (direct infringer permanently enjoined); *Adviser's, Inc. v. Wiesen-Hart, Inc.*, 161 F.Supp. 831 (S.D.Ohio 1958) (direct infringer permanently enjoined) and *Gordon v. Weir*, 11 F.Supp. 117, 124 (E.D.Mich.1953), *aff'd.* 216 F.2d 508 (6th Cir. 1954) (direct infringer permanently enjoined).

This litigation, however, is not the "ordinary" copyright case where plaintiffs seek an injunction against the direct infringer or the person who controls the infringing activity. Plaintiffs here ask the court to enjoin the manufacturer, distributors, retailers and advertiser of a machine used by persons in private homes for allegedly infringing activities. There is no precedent for plaintiffs' requested injunction.

No such injunction was granted in the cases cited by plaintiffs. Indeed, this court has found no case in which the manufacturers, distributors, retailers and advertisers of the instrument enabling the infringement were sued by the copyright holders. For example, in *Williams & Wilkins Co. v. United States, supra*, and *Wihtol v. Crow, supra*, plaintiffs did not make the manufacturer or seller of photocopy machines a defendant. In *Encyclopaedia Britannica Educational Corp. v. Crooks, supra*, the infringer was a school district that videotaped copyrighted programs, but the manufacturer of the tape recorders and the tape used in the infringement was not made a defendant. In *Elektra Records Co. v. Gem Electronic Distributors, Inc., supra*, the infringer owned retail stores which installed coin-operated tape recorders (Make-A-Tape) for customer use in duplicating prerecorded copyrighted tapes. The manufacturer of the recorders used in the infringement was not made a defendant. In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., supra*, the infringer (Mark-Fi) was a manufacturer of bootleg phonograph records, but the manufacturer of the record pressing equipment used in the infringement was not made a defendant.

As noted above, an injunction is an equitable remedy. Plaintiffs' request for an injunction against the corporate defendants is unique, and the equitable considerations are different from those found in the typical copyright case. Because the defendant's role in the asserted infringement is indirect, and because defendant's product is also used for purposes where no infringement could be alleged (*e. g.*, recording material which is not copyrighted or where permission to record is given), it is necessary to weigh the evidence of harm offered at trial. The court must consider this evidence in the context of the effect of an injunction in this case.

Plaintiffs predict a wide range of harmful effects from the various uses of Betamax. Some of these effects are immediate; others are delayed. Plaintiffs contend that each will result from one of the following uses of the Betamax machine:

1. Recording material off-the-air but never viewing the copy.
2. Time-Shifting: Recording off-the-air while not viewing the program, watching the copy within a short period of time and erasing it thereafter.
3. Librarying: Recording off-the-air and saving the tape for more than one subsequent viewing.
4. Avoiding commercials either by using the pause button while recording or by fast-forwarding while playing back.

Plaintiffs' prediction of harm from each of these uses assumes that the public will own and use a very large number of Betamax recorders. By the end of 1978, after four years of increasing sales of Betamax and several years of sales of its competitors, plaintiffs had experienced no harm. In addition to admitting that there has been no harm to date, plaintiffs admit they cannot predict at what date or level of sales the expected harms will occur. The growth of Betamax ownership will be affected by price. Today the machine costs approximately $875 with each tape costing approximately $20. The growth of ownership will also be influenced by competition from Universal's prerecorded discs and other prerecorded cassettes.

Each listed use is addressed below with plaintiffs' accompanying prediction of harm and the assumptions underlying that prediction.

A. *Recording But Never Viewing*

People may occasionally tape more material than they will watch. For example, defendant Griffiths testified that he recorded "Alpha Caper" but erased it before ever watching it.

Plaintiffs contend that even this recording merits concern as a *per se* violation of the copyright law. They do admit, however, that their copyright is not actually injured by this activity. Without this injury this court will not issue an injunction against the corporate defendants based on this use.

B. *Time-Shifting*

At least two time-shifting situations were discussed at trial. First, a person may be at work at 4:30 p. m. and want to tape a program telecast then for his viewing later that evening. For example, Lowe testified that his son would record Mickey Mouse cartoons in the afternoon for both of them to watch that evening when Lowe returned home from work. Second, during sweep periods when counter-programming is most intense, a Betamax owner may want to record one network's program while watching another. For example, plaintiffs' witnesses testified about "Betamax Sunday," February 18, 1979. On that evening, one network broadcast "Gone With the Wind" against the other network's "One Flew Over the Cuckoo's Nest" against the other network's "Elvis." The public may well have wanted to see all three, but the networks forced a choice. Betamax increases the viewer's access from one to two programs.

Plaintiffs foresee many harms from time-shifting: (1) a decrease in the size of the live audience at the time of telecast; (2) a loss to live television or other plaintiff-sponsored entertainment at the time of viewing the copy; (3) a loss to the rerun audience; and (4) a loss to theater or film rental exhibition of the same program.

(1) Plaintiffs fear that persons "watching" the original telecast of a program will not be measured in the live audience and ratings and revenues will decrease. There was testimony at trial, however, that Nielsen Ratings has already developed the ability to measure when a Betamax in a sample home is recording the program. Thus, the Betamax owner will be measured as a part of the live audience. The later diary can augment that measurement with information about subsequent viewing.

(2) Plaintiffs predict that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative. Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance.

Plaintiffs rely on the concept that "viewing time is relatively inelastic," that persons will spend only so many hours watching any kind of television. Even if that is true, the time-shifting function may simply rearrange these hours. Instead of watching two hours each night of the week, the viewer may go bowling while recording his favorite Monday night program and watch it in addition to his regular two hours on Saturday.

Furthermore, this court cannot possibly enjoin fractionalization. There is no way, nor should there be, for plaintiffs to limit the availability of alternatives to television viewing. Games, books, movies—even people—all divert potential viewers from the television set. It is impossible for plaintiffs or this court to isolate the diversion of Betamax from that of these competitors.

(3) Plaintiffs fear that time-shifting will reduce audiences for telecast reruns. The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. [illegible] current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters for rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given current market practices, this should aid plaintiffs rather than harm them.

On cross-examination, Sidney Sheinberg acknowledged an inconsistency in this prediction of harm. He further explained:

I think there is an inconsistency and I made that point in my deposition, I believe.

But what we are concerned about, Mr. Dunlavey, is the perceptions of people and the perceptions of buyers.

And there is also a nuance of distinction that is significant in the hearts and minds of people who deal, whether or not it is logically accurate, and that is between more people seeing something and the seeability being exhausted, as it were.

Now the television industry works under the theory that the more people that see a program the more successful it is, the more people will want to see it in repeats and in syndication.

That does not necessarily mean that they also don't work with the theory that the audience can be used up for a product.

(4) Plaintiffs suggest that theater or film rental exhibition of a program will suffer because of time-shift recording of that program. This suggestion lacks merit. By definition, time-shift recording entails viewing and erasing, so the program will no longer be on tape when the later theater run begins. Of course, plaintiffs may fear that the Betamax owners will keep the tapes long enough to satisfy all their interest in the program and will, therefore, not patronize later theater exhibitions. To the extent that this practice involves librarying, it is addressed in section V.C., *infra*. It should also be noted that there is no evidence to suggest that the public interest in later theatrical exhibitions of motion pictures will be reduced any more by Betamax recording than it already is by the television broadcast of the film.

Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in "not a great deal of harm." Plaintiffs' greatest concern about time-shifting is with "a point of important philosophy that transcends even commercial judgment." They fear that with any Betamax usage, "invisible boundaries" are passed: "the copyright owner has lost control over his program."

These "nuances," "perceptions," and "points of philosophy" are understandable, though not always logical. They do not, however, justify an injunction. Harm from time-shifting is speculative and, at best, minimal.

The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts.

C. *Librarying*

Plaintiffs' fear of harm goes beyond time-shifting use. They also fear that persons will not erase the tapes after one viewing but rather will build a library, *i. e.*, maintain the tapes for subsequent repeat viewing. Plaintiffs argue that persons who record and watch playbacks are removed from audiences for live television and entertainment alternatives. This contention fails for the reasons discussed above. (See V.B.2.) Plaintiffs also argue that a Betamax owner who has a copy will not watch the same program when rerun on television or re-released for theater exhibition.

This prediction also assumes too much. First, it assumes that a large number of Betamax owners will have both the desire and the income to maintain a library. Each tape costs approximately $20. An extensive library will be very expensive, and it has not been proven that many owners will "library" to any significant extent. Additionally, prerecorded discs of special programs or movies will compete with the Betamax recording. These prerecorded discs arguably are more desirable than off-the-air recordings. They have not been edited for television, and they have no commercials. Plaintiff Universal has already released full versions of "Animal House" and "The Sting" for $15.95 each. There was testimony at trial that Twentieth Century-Fox has already released fifty titles for software to be used in home videotape recorders.

To the extent that librarying does occur, it is not clear that movie audiences will decrease. There is no survey or other evidence showing that persons who own a copy of a movie will not attend a theater exhibition of that movie. Theater-going is usually a social event which affords persons a larger viewing screen, better sound and an unedited version of the film. Even if theater audiences did decrease, this decrease would be offset by the corresponding increase in the audience for the original telecast of movies. When this increase is anticipated and measured, revenue from the initial sale to television should be greater.

D. *Avoiding Advertisements*

Plaintiffs have also speculated about the reaction of advertisers to Betamax. They predict that if Betamax owners use the pause control to delete commercials or the fast forward to pass them by, advertisers will pay less to networks and networks will pay less to producers and owners. It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them. Advertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them.

E. *Injunction Would Not Be An Appropriate Remedy*

[20] The possibility that some of plaintiffs' suggested harms will occur is neither sufficiently certain nor adequately threatening to warrant an injunction against the corporate defendants. Moreover, before issuing any injunction, a court must also consider the potential harm from the injunction itself. An injunction prohibiting the marketing of Betamax or requiring destruction of its off-the-air recording capability would deprive Sony of financial reward for years of investment and improvement of this technology. Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses.

Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law.

An injunction against the Betamax would be inefficient and unwise for other reasons. Its enforcement would be nearly impossible and in any event highly intrusive. The machines are in private homes. If defendants were ordered to recall these as plaintiffs request, this order would be unenforceable without extensive inquiry into the activities of Betamax owners in their homes.

As discussed above, this court finds that home-use recording of broadcast material is not an infringement, and that if it were, the corporate defendants would not be found liable for the activity. Even if the court had found otherwise, however, an injunction would not be issued. No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date. Thus there is insufficient evidence to support a finding of harm adequate to sustain the drastic remedy of injunction.

VI. *SUMMARY*

This lawsuit presents to the court only some of the issues raised by the videotape recorder technology. The court finds that home-use recording from free television is not a copyright infringement and that, even if it were, the corporate defendants are not liable and an injunction is not appropriate.

This litigation leaves many issues undecided. Like the court in *Williams & Wilkins*, *supra*, this court recognizes that the full resolution of these issues is

> preeminently a problem for Congress: . . . Obviously there is much to be said on all sides. The choices involve economic, social and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion.

487 F.2d at 1360.

This court is bound by the factual context of this litigation. The facts do not show harm to plaintiffs even if infringing activity has occurred. Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a "black art" because of the significant level of imprecision involved in the calculations. Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm. Nor did the testimony invoke concern that denial of monopoly power over home-use recording would significantly dissuade authors and producers from creating audiovisual material for television.

In so ruling, this court does not minimize plaintiffs' concerns. The new technology of videotape recording does bring uncertainty and change which, quite naturally induce fear. History, however, shows that this fear may be misplaced. As Lewis Wasserman, Chairman of MCA, observed at trial: "[P]eople that have constantly forecast the doom of a particular industry in the entertainment industry have historically been wrong. . . . They forecast the doom of radio stations when television developed on the horizon. Radio stations are more profitable today than they have ever been." Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture.

VII. *ORDER*

A judgment shall be entered as follows:

It is ordered, adjudged and decreed that:

1. Each of the plaintiffs' requests for injunctive relief is denied.

2. Each of the plaintiffs' requests for declaratory relief is denied.

3. The plaintiffs' requests for damages and profits are denied.

4. Noncommercial home-use recording of material broadcast over the public airwaves does not constitute copyright infringement. Such recording is permissible under the Copyright Acts of 1909 and 1976 and as a fair use of the copyrighted works.

5. No defendant has competed unfairly with either plaintiff or engaged in unfair and fraudulent business practices in violation of 15 U.S.C. § 1125(a) or the laws of California.

6. No defendant has unlawfully and intentionally interfered with the contractual and advantageous business relationships of either plaintiff.

7. None of the retail or corporate defendants is directly, contributorily or vicariously liable for home-use copying.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court finds that there is no just reason for delay and directs that a final judgment shall be entered in accordance with Rules 58 and 79(a) in CV 76–3520–F. In the event that this judgment is determined not to be final, pursuant to 28 U.S.C. § 1292(b), the court declares that this opinion involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation in this case.

IT IS FURTHER ORDERED that the clerk forthwith serve copies of this memorandum opinion by United States mail upon counsel for the parties appearing in this action.

UNIVERSAL CITY STUDIOS, INC. a corporation, dba Universal Television and Universal Pictures, and Walt Disney Productions, a corporation, Appellants and Cross-Appellees,

v.

SONY CORPORATION OF AMERICA, a corporation, The Sony Corporation, a corporation, Carter Hawley Hale Stores, Inc., a corporation, Associated Dry Goods Corporation, a corporation, Federated Department Stores, Inc., a corporation, Henry's Camera Corporation, a corporation, Boyle Dane Bernbach, Inc., a corporation, and William Griffiths, Appellees and Cross-Appellants.

Nos. 79-3683, 79-3735 and 79-3762.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 6, 1981.

Decided Oct. 19, 1981.

Owners of copyrighted audiovisual material brought infringement action against videotape recorder manufacturer, the distributor, sellers, and the advertising agency retained by the distributor. The United States District Court for the Central District of California, Warren J. Ferguson, J., 480 F.Supp. 429, entered judgment for the defendants, and appeal was taken. The Court of Appeals, Kilkenny, Circuit Judge, held that: (1) off-the-air copying of telecasts of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use constituted infringement and did not constitute fair use, (2) defendants were liable for contributory infringement in that they knew that the videotape recorders would be used to reproduce copyrighted materials and induced, caused, or materially contributed to the infringing conduct.

Reversed in part, affirmed in part, and remanded.

1. Copyrights and Intellectual Property 🔑67.1

Off-the-air copying of telecasts of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use constituted infringement. 17 U.S.C.A. § 107.

2. Copyrights and Intellectual Property 🔑67.1

Off-the-air copying of telecasts of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use did not constitute fair use. 17 U.S.C.A. § 106.

3. Copyrights and Intellectual Property 🔑77

Manufacturer of videotape recorder, and the distributor, sellers, and the advertising agency retained by the distributor to promote the videotape recorder were liable for contributory infringement with respect to the off-the-air copying of telecasts of copyrighted audiovisual materials by owners of videotape recorders, in that they knew that the tape recorders would be used for such purpose and induced, caused, or materially contributed to the infringing conduct. 35 U.S.C.A. § 271(c).

4. Copyrights and Intellectual Property 🔑52

It is not necessary that alleged contributory infringer have actual knowl-

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edge that the activity which he makes possible constitutes a copyright infringement; it is only necessary that the alleged contributory infringer have knowledge of the infringing activity. 35 U.S.C.A. § 271(c); 17 U.S.C.A. § 504(c)(2).

Appeal from the United States District Court Central District of California.

Before KILKENNY and CANBY, Circuit Judges, and EAST, District Judge.*

KILKENNY, Circuit Judge:

Appellants, Universal City Studios, Inc. (Universal) and Walt Disney Productions (Disney), producers and copyright owners of audiovisual materials, some of which they choose to telecast over the public airwaves, brought this copyright infringement claim against Sony Corporation (Sony), the manufacturer of the Betamax, a videotape recorder (VTR), and Betamax tapes, Sony Corporation of America (Sonam) (the American distributor of the Betamax), four retail establishments that sell the Betamax, Doyle Dane Bernbach, Inc. (DDBI) (the advertising agency retained by Sonam to promote the Betamax), and one individual (William Griffiths), who is an owner and user of the Betamax.

Appellants argue that home video recording of their copyrighted works constitutes copyright infringement and that the corporate defendants are liable as direct, contributory and/or vicarious infringers. Additionally, appellants contend that the retail defendants violated the copyright laws when they recorded portions of appellants' programs to demonstrate the Betamax to a prospective purchaser. Likewise, appellants presented additional claims arising under state law and sought broad injunctive relief, as well as profits and damages. The district court, after three years of litigation and a five week nonjury trial, in the reported case of *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. 429 (C.D.Cal.1979), entered judgment for appellees and held:

(1) that copyright holders of audiovisual materials, some of which are sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of a videotape recorder in their homes for private, non-commercial use;

(2) the retailer did not infringe upon the copyrights where it did not compete with nor profit from materials and intended only to demonstrate the recorder;

(3) even if home-use copyrighting constituted an infringement, neither manufacturers, distributors, retailers, nor advertisers were liable under theories of direct or contributory infringement, or vicarious liability;

(4) that even if the appellees were deemed liable, injunctive relief was not available where they did not unfairly compete with owners of copyrighted materials, nor interfere with their advantageous business relations.

FACTUAL BACKGROUND

The district court in its elaborate, painstaking, and thoughtful opinion, *Universal City Studios v. Sony Corp. of*

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* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

America, supra, at 432, 442, carefully outlined the facts and the parties' contentions. In our view it would be a complete waste of judicial time and effort and of no benefit to the Bench or Bar to here repeat those facts and contentions.

ISSUES

I. Does off-the-air copying of copyrighted audiovisual materials by owners of a videotape recorder in their homes for private noncommercial use constitute an infringement?

II. Are the corporate appellees liable for infringement under any of the theories advanced?

III. If appellants are entitled to prevail, the nature of the relief to be granted.

IV. Retail store use of the copyrighted material.

V. Unfair competition claims under 15 U.S.C. § 1125(a) and state law.

I.

Our comments under this issue include:

(a) whether the district court committed error in finding an implied video recording exception in the applicable legislation, and

(b) whether home video recording constitutes fair use.

Article I, § 8, cl. 8 of the United States Constitution empowers the Congress: "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." In commenting on this clause of the Constitution, our Supreme Court has said that "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954). Despite what is said in some of the authorities that the author's interest in securing an economic reward for his labors is "a secondary consideration," it is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and that this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright scheme. This scheme relies on the author to promote the progress of science by permitting him to control the cost of and access to his novelty. It is based on the premise that the exclusive right granted by the copyright laws "will not impose unacceptable costs to society in terms of limiting access to published works or pricing them too high." The district court relied heavily on its conclusion that the Copyright Act of 1976, providing that copyright holders have monopoly power over all productions of their works, did not include reproduction of sound recordings for home use. See 17 U.S.C. §§ 106(1), (4), (5) and 107. In arriving at this conclusion, the court compared the Copyright Act of 1909, which created the fair-use doctrine to immunize some forms of copying from the literal implications of the Act. 17 U.S.C. (1970 Ed.) § 1 with the language of 17 U.S.C. § 106 of the New Act which provides:

> "Subject to sections 107 through 118, the *owner of copyright under this title has the exclusive rights to do and to authorize any of the following*:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;

> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture of other audiovisual work, to display the copyrighted work publicly." [Emphasis added.]

"The approach of the [statute] is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made 'subject to sections 107 through 118,' and must be read in conjunction with those provisions." H.R. No. 94-1476, p. 61 Sept. 3, 1976, reprinted 1976 U.S.Code Cong. & Admin.News, 5659 at 5674, 94th Congress, 2d Sess.

The statutory framework is unambiguous; the grant of exclusive rights is only limited by the statutory exceptions. Elementary principles of statutory construction would indicate that the judiciary should not disturb this carefully constructed statutory scheme in the absence of compelling reasons to do so. That is, we should not, absent a clear direction from Congress, disrupt this framework by carving out exceptions to the broad grant of rights apart from those in the statute itself. It is the duty of the courts to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question. *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976); *Commissioner v. Bilder*, 369 U.S. 499, 82 S.Ct. 881, 8 L.Ed.2d 65 (1962); *Church of Scientology of California v. U. S. Dept. of Justice*, 612 F.2d 417 (C.A.9 1979).

Our study of the record and analysis of the legislation convinces us that the district court inadvertently bypassed the statutory framework of the 1976 legislation and, in particular, § 106 of the new Act. In commenting on the "broad language" of the new Act, the district court expressed the belief that despite the monopoly power over all reproductions of their works granted by § 106, nonetheless, the legislative history indicated to the contrary. We quote from its opinion:

> "The broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works. Legislative history, however, shows that Congress did not intend this broad statement to include reproductions of sound recordings for home use. The central question here is whether Congress intended the same language to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use. Legislative history does not show this intent." 480 F.Supp. at 443.

By characterizing its task as a search for whether Congress intended to afford protection, the district court misapprehended the scope of the relevant inquiry.

The issue is not whether Congress exhibited an intent to protect a copyright holder from certain reproduction of his works. It had already expressed its intent to do so by extending the "bundle of rights" set forth in § 106 to copyright owners, *subject to specific sections,* to-wit: §§ 107–118. Consequently, our concern must be whether Congress has exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107–118. When one analyzes whether there exists an implied home video recording exception, apart from the fair use doctrine, in the light of the statutory framework, it is manifest that the district court's conclusion was erroneous. While the sound recording situation is analogous, there are a number of reasons why sound recordings should receive different judicial treatment.[1] The difference between these two approaches—did Congress intend to afford protection or did Congress intend to withdraw protection—is more than a matter of semantics.[2]

First, the copyright statute treats sound recording and audiovisual works as separate categories of protected materials.[3] And Congress has shown "special solicitude for audiovisual works."[4] For example, audiovisual materials are specifically excluded from some exemptions by the 1976 Act. 17 U.S.C. §§ 108(h), 110(*1*), 112(a). Section 108 provides strong support for the conclusion that Congress was concerned about unauthorized reproduction of audiovisual works, whether or not such reproductions were for profit. Section 108(h) excludes audiovisual works other than an audiovisual work dealing with the news from the limited exception provided by § 108. The House Report dealing with § 108(h) indicates that the doctrine of fair use may have a limited application to the reproduction of such works. House Report at 1976 U.S.Code Cong. & Admin.News at 5692. In addition, even as to audiovisual news programs, which are subject to the § 108 exemption, the H.R. notes, in regard to § 108(*f*)(3), that:

> "It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. As such, it is an

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[1] The district court's reasoning has been subject to a number of criticisms. Note, *Universal City Studios, Inc. v. Sony Corp.*: 'Fair Use' Looks Different on Videotape. 66 Va.L.Rev. 1005, 1011–12 (1980). Note, The *Betamax* Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 Stan.L. Rev. 243, 247 n. 18 (1979); 8 N.Y.U.Rev.L. & Soc. Change, 45, 48-51, 1978-79; Note, Copyright—The Home Video Recording Controversy, 81 W.Va.L.Rev. 231, 245-247 (1979).

[2] Most of the commentators have found problems with the reasoning underlying the district court's conclusion. 3 *Nimmer on Copyright,* § 13.05[F][5] at 13-95-96, n. 159 (1981); *Universal City Studios, Inc. v. Sony Corp.*: 'Fair Use' Looks Different on Videotape, 66 Va.L. Rev. 1005, 1011–12 (1980); Note, The *Betamax* Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 Stan.L. Rev. 243, 247, n. 18 (1979); 8 N.Y.U.Rev.L. & Soc. Change 45, 48-51 (1978-79); Note, Copyright—The Home Video Recording Controversy, 81 W.Va.L.Rev. 231, 245–47 (1979); Marsh, *Betamax and Fair Use: A Shotgun Marriage,* 21 Santa Clara L.Rev. 49, 61-67 (1981).

[3] 17 U.S.C. § 102 lists seven illustrative categories of "works of authorship" which are copyrightable. Section 102(a)(6) is "motion pictures and other audiovisual works" and § 102(a)(7) is "sound recordings."

[4] This reflects, no doubt, the relatively large economic investment involved in the creation of audiovisual works and the especial danger posed by unauthorized reproductions. *See* Marsh, *Betamax and Fair Use: A Shotgun Marriage,* 21 Santa Clara L.Rev. 49, 64-66 (1981).

> adjunct to the American Television and Radio Archive established in Section 113 of the Act which will be the principal repository for television broadcast material, including news broadcasts. The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause." 1976 U.S. Code Cong. & Admin.News at 5690-91.

In light of this caution with respect to the limited § 108 exemption, it is clear that Congress did not intend to create a blanket exemption for home video recording, even when the recording is not for a commercial purpose.

Second, much of the underlying rationale for the recognition of an exemption for the home recording of sound recordings is simply not applicable to videorecording. Congress, when it granted limited copyright protection to sound recordings for the first time in 1971, made it clear in the legislative history that:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. *This practice is common and unrestrained today*, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." [Emphasis added.] U.S.Code Cong. & Admin.News 1971, 1566 at 1572.[5]

Beyond question that statement was not intended to apply equally to home videorecording.[6] Perhaps most importantly,

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[5] This language was not repeated in the legislative history accompanying the 1976 Act. The district court did not find this significant. Nimmer has commented that:

> "This conclusion seems questionable on several grounds. First, the failure to repeat in the Committee Reports for the current Act an intention to recognize the home recording exemption referred to in the House Report for the 1971 Amendment is at least as consistent with an alleged intention upon the part of the Congress enacting the Act of 1976. This is particularly true in view of the fact that other passages from the House Report for the 1971 Amendment were incorporated verbatim in the House Report for the current Act. ... There is further the fact that the Amendment of 1971 was itself legislation limited to the creation of copyright in sound recordings, and did not (in this context) purport to affect the copyright in musical or other works which may be contained in such sound recordings. Therefore, the home recording exemption referred to in the House Report for the 1971 Amendment could only be applicable to the sound recording copyright, not to the copyright in any underlying work contained therein.... Finally, it is to be noted that the House Report for the current Act states that 'it is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.' H.Rep., p. 66." 3 Nimmer, *supra*, § 13.05[F][5] at 13-96, n. 159.

[6] The House Report to the 1971 Sound Recording Act carefully excluded sounds accompanying motion pictures from the scope of that particular piece of legislation.

> "In excluding the 'sounds accompanying a motion picture' from the scope of this legislation the Committee does not intend to limit or otherwise alter the rights that exist cur-

Congress simply was not addressing the problem of home video recording. Certainly in 1971, home video recording did not present Congress with a "common and unrestrained practice" developed in a period when copyright protection was wholly lacking.[7]

There is no clear legislative language indicating that home video recording is not within the exclusive rights granted by § 106. The statute itself and the House and Senate Reports accompanying the 1976 Act do not provide for a broad based home use exception. There was never a considered review of the home video recording problem. The statements supporting the district court's conclusion[8] hardly represent—when considered in the content in which they were made and in the context of the 20 year copyright revision process—a firm expression of Congressional intent to carve out a major exception to the copyright scheme.

The legislative history of the 1971 Amendment, heavily relied upon by the district court as disclosed by its opinion, 480 F.Supp. pages 444 and 445, is entirely beside the point. It is clear that the history relied upon, H.R. No. 487, 92d Cong., 1st Sess. 7, Reprinted [1971] U.S. Code Cong. & Admin.News, pages 1566, 1572, was not intended to apply equally to video home recording. We have emphasized this point in our footnote 6. Above all, it must be recognized that the Congress was in no way addressing the problem of video recording in its discussion of the 1971 legislation. Consequently, the analogy the district court attempted to draw between that legislation and the Act of 1976 is simply without foundation. There is absolutely nothing in the 1971 legislation which would indicate that the Congress was in any way concerning itself with home video recording. It is well settled that silence cannot be viewed as an expression of Congressional intent. *Turpin v. Mailet*, 579 F.2d 152 (C.A.2 1978), vacated, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645, 591 F.2d 426 (C.A.2 1979). Beyond that, where the meaning of a statute is clear and unambiguous, it would be highly improper to construe inconclusive legislative history so as to apply a statute in a manner inconsistent with its claimed meaning. *United States v. Wilson*, 591 F.2d 546 (C.A.9 1979).

Resort to the legislative history of an Act is entirely unnecessary when the statute is clear and unequivocal on its face. *United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961), rehearing denied 368 U.S. 870, 82 S.Ct. 24, 7 L.Ed.2d 70. The legislative history of a statute is not relevant when the terms of the statute are clear and unambiguous. *Natural Resources Defense Council, Inc. v. U. S. Environmental Protection Agency*, 507 F.2d 905 (C.A.9 1974).

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rently in such works. The exclusion reflects the Committee's opinion that soundtracks or audio tracks are an integral part of the 'motion pictures' already accorded protection under subsections (*l*) and (m) of Section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. . . ." 1971 U.S.Code Cong. & Admin.News at 1570-71.

[7] Motion pictures had been protected by the copyright laws since 1912.

[8] See 480 F.Supp. at 445-46. The statements of Barbara Ringer and Representative Kastenmeier were made extemporaneously at a committee hearing and on the House floor respectively, and they were in connection with the Sound Recording Act of 1971. The statements do not represent a considered review of the home videorecording problem, and even these statements do not clearly establish an intent to exempt unauthorized reproductions *apart from the fair use doctrine*.

[1] On this issue, we conclude that off-the-air copying of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use, constitutes an infringement of appellants' copyrighted audiovisual materials.

FAIR USE DOCTRINE

As indicated by the district court, the analysis of whether the recording was infringement does not end with the statutory language. While the old Act was in effect, the courts pronounced a rule of law known as the doctrine of "Fair Use." This doctrine has been appropriately described as "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (C.A.2 1939). From its inception, the doctrine has presented members of the judiciary with among the most elusive views that the courts are called upon to decide. It has been said that the doctrine is entirely equitable and is so flexible as virtually to deny definition. *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y.1968). Time after time the courts have ruled on the Fair Use doctrine, but no real definition of the concept has ever emerged. One of the better definitions is that of the Second Circuit in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (C.A.2 1966), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967), where it is said that fair use is "a privilege in others than the owners of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner" by the copyright. The Congress in the legislation of 1976 attempted to define fair use in § 107 which reads:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

It is noteworthy that the legislative history of § 107 makes it clear that its statements of the fair use doctrine offers some guidance to users in determining when the principles of the doctrine apply. However, it is there emphasized that the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules.

The history states that the legislation endorses the purposes and general scope of the *judicial doctrine* of fair use, but there is no disposition to freeze the doctrine in the statute. We quote from the closing sentence of the history:

> "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." U.S.Code Cong. & Admin.News 1976, 5680.

Consequently, and despite what is said by the district court, this fair use analysis is equally applicable to alleged violations under both the Old and the New Act. It is interesting to note that appellees have not suggested that home video recording would not violate the Old Act in the absence of a finding of fair use.

Despite the nebulous character of the doctrine, previous case law and the general copyright scheme do provide us with considerable guidance. As the first sentence of § 107 indicates, fair use has traditionally involved what might be termed the "productive use" of copyrighted material. See 66 Va.L.Rev. at 1012–1014. The purposes listed in § 107 are simply illustrative and not limitative, but they do give some idea of the general orientation of the doctrine. It is noteworthy that the statute does not list "convenience" or "entertainment" or "increased access" as purposes within the general scope of fair use.

Leon Seltzer, in his illuminating book *Exemptions and Fair Use in Copyright* (1978) states:

> "The list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: *it has always had to do with the use by a second author of a first author's work.* Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the 'ordinary' use of it. When copies are made for the work's 'ordinary' purposes, ordinary *infringement* has customarily been triggered, not notions of fair use." *Id.* at 24. [Emphasis in original.]

The cases have, for the most part, adhered to this aspect of the fair use doctrine. If an alleged infringer has reproduced a copyrighted work to use it for its intrinsic purpose, fair use has not generally been applied. Nimmer notes, however, that the courts have not adhered to this notion in recent years, and cites two cases as authority—*Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975), and the district court's opinion in this case. *Nimmer, supra*, § 13.05[A][1] at 13-58 n. 23.3. *Williams & Wilkins Co.*, which has been appropriately regarded as the "Dred Scott decision of copyright law", 487 F.2d at 1387 (Nichols, J., dissenting), is clearly not binding in this circuit, and, in any event, we find its underlying rationale singularly unpersuasive. The district court, while noting that *Williams & Wilkins Co.* "has little precedential value," 480 F.Supp. at 450, and quoting Nimmer's critique of the opinion, *Id.* at 451, used *Williams & Wilkins Co.'s distortions of the fair use rationale to justify an application of the doctrine which, in our opinion, stretches fair use beyond recognition and undermines our traditional reliance on the economic incentives provided to authors by the copyright scheme.*

In *Williams & Wilkins Co.*, the Court of Claims found that copying by the National Institute of Health (NIH) and the National Library of Medicine (NLM) of entire articles published in plaintiff's journals was fair use. Plaintiff was the publisher of certain medical and scientific journals. The libraries regularly filled requests for journal articles (including some in plaintiff's journals) by photocopying such articles. Under this system, the libraries copied approximately 200,000 articles a year. The majority identified the core of its fair use finding:

"First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringement; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine." 487 F.2d at 1354.

We believe that *Williams & Wilkins Co.* is clearly distinguishable. It appears that the Court of Claims was primarily concerned about the serious damage to medical science that would result if it held for the plaintiff. In this case, there is no corresponding countervailing societal benefit to "weigh" against the copyright interests of the author. We do not mean to suggest that increased access to such Disney products as "Chip and Dale/Mixed Nuts" is not a benefit to society. We only mean to say that the consequences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in *Williams & Wilkins Co.*

Aside from the obvious distinctions between *Williams & Wilkins Co.* and the instant case, we believe that the Court of Claims' approach—in treating intrinsic use of such work as within the bounds of fair use—created doctrinal confusion that raises the spectre of the evisceration of the traditional workings of the copyright scheme. As Seltzer has stated:

"The traditional fair use notion has had to do with the sort of access that the mind of a user has to a copyrighted work: the work is instantly accessible on sight or hearing, and the question is what the second user would or should be allowed to 'do' with it—or, more accurately, what the creator of the work ought to have expected him freely to do with it. Use for photocopying and phonorecording involves a different sort of access: the possibility—and the capability—of instant reproduction of the work in the same mode and for the same purpose the original was in the first place acquired. With the first sort of access and use we can deal under notions of fair use, even when it involves photocopying, for appropriate expectations of economic reward are essentially unchanged. *The second kind of access and use triggers questions of reallocation of costs, however, and insofar as a use is of that sort, it is appropriately dealt with as an exemption from the normal workings of the copyright scheme, . . .*" Seltzer, *supra*, at 37-38. [Emphasis added.]

Seltzer concludes that exemptions from the normal workings of the copyright scheme, because they involve the reallocation of costs, are matters for Congress, not the courts.

We hold that, particularly in the context of new technology, there is a danger to including the sort of copying involved in *Williams & Wilkins Co.* within the scope of the fair use doctrine. New technology, which makes possible the mass reproduction of copyrighted material (effectively taking control of access from the author), places a strain upon the fair use doctrine. A court, if it decides that fair use is applicable, is required to weigh—in "balancing the equities"—the "benefit" of an extremely popular increase in access with the "harm" to a plaintiff. The harm to a copyright plaintiff is inherently speculative, and as *Williams & Wilkins Co.* and the district court decision indicate, a plaintiff is faced with the unenviable task of proving the nonexistence of fair use, which has typically been viewed as a *defense.*

The costs are also important. They fall primarily into two categories. First, the result of applying fair use to intrinsic use cases like *Williams & Wilkins Co.* and this case is a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use. Second, the framework for copyright litigation this view establishes is ultimately hostile and extremely adverse to the rights of copyright holders. It places them in the unenviable position of proving damage in a context in which extreme difficulty is acknowledged.

As a society, we may decide that these costs *are* acceptable. But, that branch of public policy determination is preeminently a decision for the legislative branch.

[2] It is our conviction that the fair use doctrine does not sanction home videorecording. Without a "productive use", *i. e.* when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use. An analysis of the four factors listed in § 107 does not dictate a contrary result.

A consideration of the first factor—"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"—does not aid appellees' case. The district court noted that "Courts have traditionally applied this factor by asking whether the copyrighted material is used for criticism, research or other independent work." 480 F.Supp. at 453. The fact that the use involved does not further a traditionally accepted purpose clearly weighs against a finding of fair use. The district court, however, emphasized the noncommercial[9] and home use of the copyrighted material. The statute does not, however, draw a simple commercial/noncommercial distinction. The statute contrasts commercial and nonprofit educational purposes, and there is no question that the copying of entertainment works for convenience does not fall within the latter category. The fact that the "infringing" activity takes places in the homes does not warrant a blanket exemption from any *liability.* It seems more appropriate to address the privacy concerns raised by the district court in fashioning the appropriate relief. The suggestion that First Amendment concerns support the purpose of Betamax users to increase the access to copyrighted materials is wholly without merit. "The first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (C.A.5 1979); *Walt Disney Productions v. Air Pirates,* 581 F.2d 751, 759 (C.A.9 1978), *cert. denied,* 439 U.S. 1132,

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[9] "[C]ommercial use tends to cut against a fair use defense." *Triangle Publications, Inc. v. Knight-Ridder Newspapers,* 626 F.2d 1171, 1175 (C.A.5 1980) (footnote omitted). Noncommercial motive does not mean fair use. 66 Va.L.Rev. at 1017; Marsh, *supra,* at 68–71. The "noncommercial" characterization of home videorecording is a bit misleading. The corporate defendants involved in the lawsuit are obviously not in the business of promoting home video recording for strictly altruistic reasons.

99 S.Ct. 1054, 59 L.Ed.2d 94 (1979); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1160-1171 (C.A.9 1977).

The second factor—"the nature of the copyrighted work"—does not support a finding of fair use. The legislative history and the case law dealing with this factor are rather sparse, but there seems to be some indication that the scope of fair use is greater when informational type works, as opposed to more creative products, are involved. Seltzer, *supra*, at 33-34; Nimmer, *supra*, § 13.05[A][2] at 13-61. The courts inquire whether the nature of the material is such that additional access "would serve the public interest in the free dissemination of information." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307; *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y.1968). If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted.[10] The district court, however, found it significant that "This case involves only that copyrighted material which plaintiffs voluntarily choose to have telecast over public airwaves to individual homes free of charge." 480 F.Supp. at 453. We fail to see how the method by which appellants have chosen to distribute their works is relevant to this factor of the fair use analysis. We are in substantial agreement with one commentator's discussion of the district court's analysis on this issue:

> "While this attribute of the broadcast industry complicates the economic harm analysis, it has no bearing on society's interest in the dissemination of the material or the author's reasonable expectation of compensation for repeated use of his material. These issues, basic to the rationale of the fair use doctrine, implicate the intrinsic qualities of the work, not the medium of its presentation. The *Sony* court's analysis obfuscated the real issue at stake; whether the public interest in promoting the development of art and science dictates disregarding a copyright holder's interest in controlling the use of his product. In *Sony*, the copyright owner's interest should have taken precedence." 66 Va.L.Rev. at 1020-21.

The third factor—"the amount and substantiality of the portions used in relation to the copyrighted work as a whole"—clearly weighs against a finding of fair use. The district court acknowledged that "Home use recording off-the-air usually involves copying the entire work," 480 F.Supp. at 454, and that this typically precludes a finding of fair use. The court concluded, however, that the courts have *only* been concerned about the "substantiality" of the copying when it produced harm, and that "this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for 'plaintiff's original work.'" *Id.* We believe that this view of the case law is completely wrong.

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[10] *Rohauer v. Killiam Shows, Inc.*, 379 F.Supp. 723, 733 (S.D.N.Y.1974), *rev'd on other grounds*, 551 F.2d 484 (C.A.2 1977), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 ("There is no discernible public interest in the dissemination of 'The Son of the Sheik' sufficient to justify the infringement .... It can scarcely be argued here that the enduring fame of Rudolph Valentino or the intrinsic literary and historical merit of 'The Son of the Shiek' (whatever it may be) serves any public interest sufficient to endow these defendants with the privilege of fair use."); *Loew's Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165, 175 (S.D.Cal.1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (C.A.9 1956), *aff'd by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958).

In *Walt Disney Productions v. Air Pirates, supra*, we stated "While other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, this and other courts have accepted the traditional American rule that excessive copying precludes fair use." *Id.* at 758. In addition, the district court in *Loew's Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D.Cal. 1955), stated "The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial." *Id.* at 184. A panel of this court later affirmed *Benny v. Loew's, Inc.*, 239 F.2d 532 (C.A.9 1956), and specifically noted that "The judgment is affirmed upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of [the district judge]." *Id.* at 537. These cases clearly did not limit their discussion of "substantiality" to cases in which the plaintiff had been harmed. It seems clear that these cases are based, in part, on the notion that copyright is a property interest and that it is impermissible, in the vast majority of cases, to "appropriate" the copyrighted material without the owner's consent. The copyright laws afford the author the right to control access to his work, and, absent compelling justifications, this right should not be abridged.

We need not rest our holding on the applicability of the "substantiality" discussion in *Air Pirates* and *Loew's* to the home videorecording context, but it seems clear that this factor in the fair use calculus weighs heavily in appellants' favor.

The fourth factor—"the effect of the use upon the potential market for or value of the copyrighted work"—does not support a contrary result. In light of the preceding discussion, we do not believe that it is necessary to address the harm issue with respect to the liability question. We feel compelled, however, to express our disagreement with the district court's approach on this issue.

First, it seems apparent that the district court was much too strict in requiring appellants to establish its degree of harm.[11] Our sentiments are the same as those of one of the dissenters in *Williams & Wilkins Co.* who stated, "Although the court states that it rejects the trial determinations as to both actual and potential damage to plaintiff, I think the opinion shows that the court's conclusion is based primarily on its finding that *plaintiff failed to prove actual damages.*" 487 F.2d at 1367 (Cowen, C. J., dissenting). [Emphasis added.] That is simply too great a burden to impose on copyright plaintiffs. Nimmer has suggested that "the central question in the determination of fair use is whether the infringing work *tends* to diminish or prejudice the potential sale of plaintiff's work." 3 Nimmer, *supra*, § 13.05[E][4][c] at 13-84.

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[11] The courts typically state that irreparable harm is presumed. *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243, 247, 251 (W.D.N.Y.1978). The presumption noted in *Crooks* was not because of the procedural posture (motion for preliminary injunction). The court noted that, at trial, the defendant would have an opportunity to rebut the presumption. In our case, it is clear that appel-

[Emphasis added] [Footnote omitted.][12] Under this sort of standard, it seems clear that appellants should have prevailed. Since the copies made by home videorecording are used for the same purpose as the original, a finding of fair use is not justified.[13] The district court seems to recognize, on several occasions, that appellants will have to take affirmative steps to compete with the appropriated versions of their work. That such competition is necessary supports appellants' allegations of harm; at the least, it makes clear that the "infringing" activity *tends* to prejudice the potential sale of appellants' work. It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market.

Second, we do not believe that the district court paid sufficient attention to the fact that it is extremely difficult for a copyright plaintiff to prove harm from the activities of specific defendants. 3 Nimmer, supra, § 13.05[E][4][c]. As Nimmer states, "Far from this justifying a defense of fair use, failure to prove damages will in the usual case give rise to a minimum statutory damages liability. It is only when the general dissemination of an allegedly infringing work by all potential defendants, and without limitation as to the number of reproductions, and volume of users would still not adversely affect the plaintiff's potential market that a conclusion of fair use may be justified." *Id.* at 13-84.[14] The district court quoted, in what seemed to be an approving manner, similar sentiments from one of Nimmer's law review articles, but the court clearly did not use this rationale in deciding the fair use question. The court, in analyzing the fourth fair use factor, did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders. It seems clear that absent an inquiry which takes into consideration the full scope of the "infringing" practice, copyright plaintiffs, in cases of this sort, would face insuperable obstacles to the protection of their rights. And, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the *potential* market for appellants' works.

II.

LIABILITY OF CORPORATE DEFENDANTS

[3, 4] We disagree with the district court's conclusion that even if it were to hold that home-use copying was an infringement under the Old and the New Acts and was not fair use, the court could not find the appellees Sonam, Sony, DDBI and the four retail stores liable for this type of infringement. 480 F.Supp. at 457.

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lees did not establish with any degree of certainty that such harm was not likely to occur.

[12] The Second Circuit has used this approach. *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (C.A.2 1977).

[13] Put another way, because the copies serve the same function as the original, the "functional test" suggests that fair use is not available. 3 Nimmer, *supra*, § 13.05[B]; *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-operative Productions, Inc.*, 479 F.Supp. 351 (N.D.Ga.1979).

[14] Senate Report 94-473 seems to express a somewhat similar concern about mass proliferation of minor infringements: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Id.* at 65.

At the outset, it is necessary to make a couple of observations about the district court's analysis. The court relied heavily on a "staple item of commerce"[15] theory in rejecting appellants' claims. The district court stated that "Selling of a staple article of commerce—*e. g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management." 480 F.Supp. at 461. This reliance on the "staple article of commerce" theory was inappropriate. Appellees' analogy of videotape records to cameras or photocopying machines may have substantial benefit for some purposes, but does not even remotely raise copyright problems. Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material.[16] Therefore, videotape recorders are not "suitable for substantial noninfringing use." See 3 Nimmer *supra*, § 12.04[A] at 12–39, 12–40. That some copyright owners choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs.

A second observation about the district court's analysis is in order. The court found that the corporate appellees' knowledge was insufficient to make them contributory infringers. This was based, in part, on the court's assertion that "defendants here could not know what copyright law required. Before this lawsuit, that issue had not been determined." 480 F.Supp. at 460. It is not necessary that an alleged contributory infringer have actual knowledge that activity which he *makes possible* constitutes a copyright infringement. A copyright defendant's "innocence" does not absolve him of liability; it only affects the remedies available.[17] For example, the statute provides for a *reduction* of statutory damages if the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," 17 U.S.C. § 504(c)(2), and a *remission* of statutory damages, *in limited circumstances*, if the "infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use." *Id.* In this context, a defendant's mistake as to the legal consequences of his actions does not constitute an excuse for an infringement. It is only necessary that a copyright defendant have knowledge of the infringing *activity*. It cannot be argued that the corporate appellees cannot be held to have the knowledge that the Betamax will be used to reproduce copyrighted material, some of which appellants own. We adopt the district court's definition: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (C.A.2 1971) (footnote omitted). There can be no doubt that the corporate appellees meet this definition.

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[15] See 35 U.S.C. § 271(c) (defining contributory infringement in patent context and providing for exception for "a staple article or commodity of commerce suitable for substantial noninfringing use"); *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 488–89, 84 S.Ct. 1526, 1533–34, 12 L.Ed.2d 457 (1964).

[16] For examples, see Nimmer, *supra*, § 12.04[A] at 12–39–40.

[17] 3 Nimmer, *supra*, § 13.08. This discussion of "liability" obviously only pertains to civil, not criminal, liability.

First, the knowledge element is clearly satisfied. The corporate appellees "know" that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's consumer appeal. The record establishes that appellees knew and expected that Betamax's major use would be to record copyrighted programs off-the-air. Second, there is no doubt that appellees have met the other requirements for contributory infringement—inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable. *See generally* 66 Va.L.Rev. at 1021–24; 31 Stan.L.Rev. at 257–260; 52 S.Cal.Rev. at 601–607; 81 W.Va.L.Rev. at 247–49.

III.

RELIEF

Because we have found that home videorecording constitutes copyright infringement and that appellees are liable for such use, the district court's judgment must be reversed and the case remanded for a consideration of the appropriate relief. The relief question is exceedingly complex, and the difficulty in fashioning relief may well have influenced the district court's evaluation of the liability issue. The difficulty of fashioning relief cannot, however, dissuade the federal courts from affording appropriate relief to those whose rights have been infringed.

Appellants stated at oral argument that they were seeking a remand to the district court so that the district court could fashion the appropriate relief. This approach makes a good deal of sense; a district court is in a better position to resolve, in an appropriate fashion, the relief question.

There are a number of possibilities that the district court may want to consider. Because of the difficulty of proving the precise nature of the harm to appellants, statutory damages may be appropriate. 17 U.S.C. § 504(c). The district court also has a broad range of equitable remedies from which to choose. Section 502(a) provides that the court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." The district court determined that an injunction would not be an appropriate remedy. 480 F.Supp. 463–69. The court should reconsider this action.

We note that, as a general rule, a copyright plaintiff is entitled to a permanent injunction when liability has been established and there is a threat of continuing violations. Indeed, Nimmer states that "Generally, it would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a threat of continuing infringement." 3 Nimmer, *supra*, § 14.06[B] at 14–53—14–54. In discussing the analogous photocopying area, Nimmer suggests that when great public injury would result from an injunction, a court could award damages or a continuing royalty.[18] This may very well be an acceptable resolution in this context.

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[18] "Ordinarily it would be improper, and even an abuse of discretion for a court to deny a permanent injunction where liability and a threat of continuing infringement have both been established. But if one looks to other areas of property law it is clear that a proper-

In fashioning relief, the district court should not be overly concerned with the prospective harm to appellees. A defendant has no right to expect a return on investment from activities which violate the copyright laws. Once a determination has been made that an infringement is involved, the continued profitability of appellees' businesses is of secondary concern.

IV.

RETAIL STORE USE

We find no error with the district court's discussion of the fair use question in regard to the retail store use. Therefore, we affirm that portion of the decision.

V.

UNFAIR COMPETITION CLAIMS

In light of our previous discussion, we have decided to vacate the district court's earlier disposition of the unfair competition claims and remand for reconsideration. We express no view on the merits of these claims.

VI.

CROSS-APPEAL

The appellees below have cross-appealed because of the district court's failure to receive evidence on three affirmative defenses: (1) laches and estoppel, (2) copyright invalidity, and (3) unclean hands/copyright enforceability. On this appeal, we reverse and remand. The district court should give appellees an opportunity to establish these defenses.

CONCLUSION

We find no Congressional intent to create a blanket home use exception to copyright protection and that home videorecording does not constitute fair use. In addition, the appellees are legally responsible for the infringing activity. The district court's decision must be reversed and the case remanded for appropriate proceedings. The court should consider the unfair competition claims and the affirmative defenses. If appellants prevail on the defenses, the district court should fashion appropriate relief.

The judgment of the district court is reversed in part, affirmed in part, and the case remanded for appropriate proceedings.

IT IS SO ORDERED.

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ty owner may be denied a permanent injunction against further violations of his property right where such an injunction would work a substantial injury to the public interest as well as to that of the particular defendant. *In such circumstances the property owner may be awarded, in lieu of an injunction, a reasonable royalty for the further use of his property. The courts might well conclude that photocopying practices for private use, particularly in the area of scientific writings, involve just such a public interest, so that a judicially created compulsory license as a substitute for injunctive relief could be found appropriate.*" 3 Nimmer, supra, § 13.05[E][4][e] at 13-91. [Emphasis added.]

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX F

Nos. 79-3683, 79-3735, 79-3762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL CITY STUDIOS, INC., a corporation, dba UNIVERSAL TELEVISION and UNIVERSAL PICTURES, and WALT DISNEY PRODUCTIONS, a corporation,

Plaintiffs, Appellants and Cross-Appellees,

vs.

SONY CORPORATION OF AMERICA, a corporation, THE SONY CORPORATION, a corporation, CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation, DOYLE DANE BERNBACH, INC., a corporation, and WILLIAM GRIFFITHS,

Defendants, Appellees, Cross-Appellants and Petitioners.

Petition for Rehearing and Suggestion for Rehearing in Banc.

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PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit, John F. Kilkenny, William C. Canby, Jr. and William G. East:

Appellees respectfully petition the Court to grant a rehearing in this matter pursuant to Rule 40 of the Federal Rules of Appellate Procedure — on the ground that determinative points of fact and law have been overlooked and misapprehended, as set forth hereinafter in petitioners' brief; to withdraw the panel's opinion dated October 19, 1981, which holds that all "home video recording constitutes copyright infringement" and that "the appellees [VTR manufacturer, distributor, national advertising agency and retail stores] are liable for such use" without regard to the circumstances; and to enter a new opinion holding:

1. Video recording reception at home, followed only by non-public performance at home, of appellants' programming which had been broadcast or transmitted for the use of the general public did not constitute infringement of copyright in such programming; and

2. The manufacture and/or sale of a video recorder does not, *per se*, constitute contributory infringement of copyright if that video recorder is used for direct infringement of copyright.

SUGGESTION FOR REHEARING IN BANC.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Appellees respectfully suggest that a rehearing in this action is appropriate for consideration by the Court in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure — on the ground (supported hereinafter in petitioners' brief) that questions of exceptional importance are involved, the incorrect resolution of which by the panel's opinion of October 19, 1981 has impugned the legality of the daily conduct of millions of American consumers who own and use videotape recorders for private purposes in their homes and further has threatened the livelihood of thousands of Americans who are engaged in providing videotape and videotape recorders for the public.

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Appendix A

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Nos. 79-3683, 79-3735, 79-3762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL CITY STUDIOS, INC., a corporation, dba UNIVERSAL TELEVISION and UNIVERSAL PICTURES, and WALT DISNEY PRODUCTIONS, a corporation,

Plaintiffs, Appellants and Cross-Appellees,

vs.

SONY CORPORATION OF AMERICA, a corporation, THE SONY CORPORATION, a corporation, CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation, DOYLE DANE BERNBACH, INC., a corporation, and WILLIAM GRIFFITHS,

Defendants, Appellees, Cross-Appellants and Petitioners.

PETITIONERS' BRIEF.

Introduction.

The panel's opinion in this case takes a limited dispute between the parties and uses the case (with no pretense of adhering to, or being confined to, the facts) as a vehicle to make lawbreakers out of every American consumer (over 3 million families to date, and increasing daily) who uses any video tape recorder (VTR) to record any television program — no matter what the program and no matter what use is made of the recording. The opinion also makes the manufacturer, distributor and retailer of the VTR strictly and contributorily liable, along with the consumer, every time such a recording is made. The opinion is so blatantly erroneous that even laymen see its fallacies and deride it (*e.g.*, Appendix A hereto). The opinion must be withdrawn lest an industry be destroyed and the public be deprived of one of the most valuable technological achievements of the decade.

Free off-the-air television in the United States is *broadcast or transmitted* by at least 986 stations (another 1000-1500 are coming) pursuant to licenses which have been granted by the Federal Communications Commission ("FCC") for the purpose of furthering "the public interest, convenience, and necessity" (47 U.S.C. § 309(a)); and lawfully is *received* by the public because it "is broadcast or transmitted . . . for the use of the general public . . . ." (47 U.S.C. § 605). For many years such public TV reception has been both by use of the television set for instantaneous viewing and by use of the VTR for later ("time-shift") playback and viewing. Both the television set and the VTR are FCC licensed receivers. This case is concerned only with such home use recording of free off-the-air television (district court opinion — 480 F.Supp. 429, 432-433, 442, 454).

The home use recording issues in this case were whether any one or more of just 32 specific home recordings of the two appellants' works constituted copyright infringement and, if so, whether any of certain appellees (the VTR manufacturer, distributor or national advertiser) was liable therefor. The opinion of the Ninth Circuit panel refers to the district court's opinion as "elaborate, painstaking, and thoughtful" (p. 5251), acknowledges that the district court "carefully outlined the facts" (p. 5252), and then proceeds to overlook and misapprehend virtually every finding of fact made by the district court, reviewing none of the 32 specific instances involving appellants' works but rather making sweeping holdings that *all* "home video recording constitutes copyright infringement" and "that appellees are liable for such use" irrespective of the circumstances — and remands the case to the district court for a "consideration of the appropriate relief" stating, *inter alia*, that the district court should "reconsider" its determination "that an injunction would not be an appropriate remedy [*e.g.*, because 'An injunction would deprive the public of a new technology capable of noninfringing uses' — see 480 F.Supp. 464]" and that "In fashioning relief, the district court should not be overly concerned with the prospective harm to appellees" and "the continued profitability of appellees' businesses is of secondary concern." (pp. 5265-6).

The Supreme Court can grant certiorari at this stage of the case or it can wait until after the remand (p. 5266). If issuance of a mandate to the district court is not stayed by the Supreme Court's grant of a writ of certiorari at this stage of the case, and if this petition for rehearing is not granted, the panel's opinion may stand for years as binding precedent in this Circuit — wherein all future actions against VTR manufacturers and dealers can and presumably will be brought. The first to be crushed under appellants' heel will be appellees and the Betamax brand of VTR. Then will come the elimination of all VTRs, as appellants carry out their threat to divide and conquer (Appellants' Opening Brief p. 2, Appendix A). And then will come implementation of appellants' threat to use the opinion in furthering their goal to eliminate audio tape recording of radio broadcasts (C.R. 19/192, pp. 30-31).

A. The Question of Contributory Infringement.

The panel's opinion is the first judicial decision in American legal history to hold the manufacturer, distributor or retailer of a device liable as a contributory infringer of copyright when someone used that device in the course of direct infringement.

First, the opinion states that videotape recorders are intended "for the primary purpose of reproducing television programming" and that "Virtually all television programming is copyrighted material"; then, based thereon, the opinion makes the grossly erroneous non-sequitur holding that "Therefore, videotape recorders are not 'suitable' for substantial noninfringing use." (p. 5264).

The opinion thus contravenes numerous district court findings of fact that "The videotape recorder, like a[n] [audio] tape recorder, is a staple item of commerce. Its uses are varied", that the VTR "is also used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)", etc. (480 F.Supp. 458, 464, 465, 468) — a contravention which can be explained only if the panel overlooked the massive evidence at trial of televised "non-copyrighted material or material whose owners consented to the copying" (480 F.Supp. 468) which is the subject of extensive home recording.

Exemplar consenting owners of copyrighted televised programming included Major League Baseball, the National Football League, the National Hockey League, the National Collegiate Athletic Association, National Religious Broadcasters, Faith Center, the Bureau of Mass Communications of the New York State Education Department, the Center for Library Media and Telecommunications of the Board of Education of the City of New York, the New Jersey Public Broadcasting Authority, the Los Angeles City School Board of Education, as well as owners of Mr. Rogers' Neighborhood (the most widely viewed children's programming in the nation, with three million families viewing daily) and the Spider Man series. There also was evidence of programming on which copyright has expired, and programming as to which registration and infringement action regularly is rendered impossible by erasing the programming from the tape which had given it tangible form.

The opinion says "That some copyright owners choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs." (p. 5264). The opinion overlooks the fact that the two appellants are the only parties who ever have sued to prevent home use recording. The extent of home use recording of appellants' works is *de minimis* in the overall scheme of public television transmission and reception. The evidence overlooked by the court showed that the "*some* copyright owners" who do not object to home recording constitute the owners of well over 95% of all televised programming.

Second, the opinion misapprehended well established law — all legal precedent is that the manufacturer, distributor or retailer of a staple item of commerce, *e.g.*, an item which is suitable for substantial noninfringing use, is not liable for a consumer's infringing use.

The panel's opinion says, without factual basis, "there is no doubt that appellees have met the other requirements for contributory infringement — inducing, causing, or materially contributing to the infringing conduct of another." (p. 5265). The opinion overlooks the unchallenged findings of fact to the effect that "there was no evidence at trial that any advertisements or other statements by defendants in any way induced or caused to be made any of the copies at issue" (480 F.Supp. 436-8, 459, 460) — in fact, there was no evidence of any kind of inducement, causation or material contribution by any appellee.

Third, the opinion holds the four retail store appellees to be contributory infringers as to home use recording (p. 5263), completely overlooking and misapprehending that these appellees never even were alleged to have such liability (C.R. 2/1, 13/292, 21/241). Allegations against the retail stores were based solely on their store-use demonstrations of Betamax (480 F.Supp. 456), a use the opinion affirms as a fair use (p. 5266). In fact, three of these retail store appellees didn't even sell a VTR used for any of the home-use recordings in issue (480 F.Supp. 459).

B. The Question of Direct Infringement.

Contrary to the district court's finding that the New Act permits home use off-the-air video recording of copyright programming (480 F.Supp. 443, 446-7), the panel's opinion is the first judicial decision in American legal history to find copyright infringement by virtue of conduct taking place entirely in the privacy of the home.

The Point of Legislative History.

The opinion holds that "the grant of exclusive rights [to the copyright owner by 35 U.S.C. § 106] is only limited by the statutory exceptions [§§ 107-118]"; and that "Resort to the legislative history" of the New Copyright Act thus is "entirely unnecessary" and "not relevant" because "the statute is clear and unequivocal on its face" and does not contain an express home use off-the-air video recording exception (pp. 5253, 5256).[1] Inconsistently, the opinion grudgingly refers to "recognition of an exemption for the home recording of sound recordings" (p. 5255), and then misapprehends that the statute does not contain an express exception for home use audio recording either — this audio exemption likewise exists only by "resort to the legislative history."

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[1] The opinion misapprehends the law as repeatedly set forth by the Supreme Court and as followed by the district court (480 F.Supp. 443): "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its [legislative history] use, however clear the words may appear on 'superficial examination.' " *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976).

Moreover, the opinion says "There is no clear legislative language indicating that home video recording is not within the exclusive rights granted § 106." (p. 5256). The opinion thereby overlooks and misapprehends that the same legislative history which supports the home use audio recording exception equally supports a home use video recording exception;[2] there is no legislative history to the contrary (480 F.Supp. 443).

The opinion misapprehends the significance of the legislative history by saying that Congress then "was not addressing the problem of home video recording"; the significance is that Congress then was creating some new copyright rights in sound recordings and was clarifying that these new rights were not to detract from the established "fair use" public practice of home recording from off-the-air radio and television. Integrated video off-the-air recorders (like the Betamax) then had been in the United States market since 1965; integrated audio off-the-air recorders since 1966.

---

[2] *E.g.*, "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."

> Report of the Register of Copyright on the General Revision of the U.S. Copyright Law, Report to House Committee on the Judiciary (1961), p. 30.

"[Representative] Kazen [D. Tex.]. In other words, if your child were to record off a program which comes through the air on the radio or television, and then used for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?

"[Representative] Kastenmeier [D. Wisc.] This is not included in the bill . . . this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. . . ."

> 117 Cong. Rec. 34748-49 (October 7, 1971).

Contrary to the opinion's misapprehending and belittling of Representative Kastenmeier's statement as having been made "extemporaneously", it was made by Representative Kastenmeier in his capacity as Chairman of the Subcommittee responsible for the New Act, on the House floor to explain to the House the scope of the proposed 1971 Amendment statute, just a few days prior to the House's passage of the Amendment. It remains the last official word on the subject to this day. (480 F.Supp. 443-6).

The Point of Fair Use.

"Since the issue of fair use is one of fact . . ., the clearly erroneous standard of review is appropriate." *MCA v. Earl Wilson*, 1981 Copyright Law Decisions. ¶ 25,287. p. 16,582 (2d Cir. 1981). The district court's finding of fact was that home use recording is fair use (480 F.Supp. 442, 446-456); the opinion holds it cannot be because there is no "productive use" (pp. 5260, 5266) and, in so doing, misapprehends both the law and the deference due the district court's findings.

As to the statutory fair use test of *harm* or *effect*, the district court found that "Plaintiffs have admitted that no actual harm to their copyrights has occurred to date", that "'No likelihood of harm was shown at trial'' and that VTR usage "does not reduce the market for plaintiffs' works" (480 F.Supp. 439-440, 451, 456, 463, 465, 468-9; R.T. 3260, 3268); moreover, neither MCA nor Disney offered any evidence whatsoever as to any effect on the potential market for any of the 32 works in issue. The panel's opinion wholly overlooks these facts and lack of evidence, bridging the evidence gap with a simple assumption that "it seems clear that [home use recording] tends to diminish the potential market for appellants' works." (p. 5263). The opinion says the district court "did not pay sufficient attention to the cumulative effect of mass reproduction of copyrighted works" (p. 5263) --- overlooking the fact that there was no evidence of "mass reproduction" or "cumulative effect."

Thirty-one of the works in issue were recorded only once, and one was recorded twice.

As to the test of *purpose of the use*, the district court found that the purpose is "noncommercial and in the home" (480 F.Supp. 453-4), furthering the First Amendment policy of providing the fullest possible access to information through the public air waves, not just as a matter of convenience but to provide access to those who cannot view at the time of broadcast — for example, those who must be at work. The panel's opinion says the purpose is not a "traditionally accepted purpose" of "criticism, research or other independent work" (pp. 5258, 5260), and characterizes all VTR home use recording as a "copying of entertainment works for convenience" (p. 5260) — firstly misapprehending the admonition of the 1976 House Report and the 1975 Senate Report that "there is no disposition to freeze the [traditionally accepted fair use] doctrine in the statute, especially during a period of rapid technological change", and, secondly, overlooking the aforesaid vast evidence of recording of non-entertainment programming and for purposes other than convenience.

As to the test of *nature of the work copied*, the district court found that the salient nature was that the works were ones which appellants "voluntarily choose to have telecast over public air waves to individual homes free of charge" (480 F.Supp. 453). The panel's opinion admits that the panel "fail[ed] to see" the relevance of this point (p. 5261) — which is that appellants intended and expected that their works would be transmitted and received and viewed at home by the public, and that this is all that has happened.[7]

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[7] The evidence showed that measurable audience-increasing time-shifting is the predominant use of the VTR and the district court found it causes no harm (480 F.Supp. 467). So did the FCC — "Because both major rating services — A.C. Nielson and Arbitron — now include an indication of VCR use, this time-shift phenomenon should actually be an asset to the networks and broadcasters."

Federal Communications Commission — Network Inquiry Special Appendix "Home Video: A Report in the Status, Projected Development and Consumer Use of Videocassette recorders and Videodisc Players" (1980).

Appellants' works comprise only a miniscule portion of the TV programming which is transmitted and received by recording -- when appellants elected to transmit their works on public TV, the predominant nature of their telecast works became that they bore appellants' implied consent to be bound by the rules of the game — appellants should not be allowed to spoil the game for everybody else just because they commingle their programming amongst all the vast TV programming as to which there is no opposition to VTR reception.

The opinion states that "If an alleged infringer has reproduced a copyrighted work to use it for its intrinsic purpose, fair use has not generally been applied", and recognizes that this broad denigration of fair use (if relevant at all) is contrary to the holding of *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). The opinion unequivocally implies that, if *Williams & Wilkins Co.* had been tried in the Ninth Circuit, the federal government would have been held a direct infringer for photocopying copyrighted articles taken from medical journals and then providing the copies to doctors (pp. 5258-60) — and the Xerox Co. (if it had been a party) implicitly would have been held to be a contributory infringer, just as Sony Corporation is held to be here. The panel's opinion thus leaves Pandora's box wide open.

C. Conclusion.

The opinion holds that all "home video recording constitutes copyright infringement" and that "the appellees are liable for such use" without regard to the circumstances (p. 5265). This holding will be the death knell of the VTR if not withdrawn. The opinion places appellants' "interest in securing an economic reward for [their] labors" above the public interest (p. 5252), contrary to the Constitution's goal "To promote the progress of science and useful arts", contrary to the Supreme Court's guidelines that "private motivation must ultimately serve the cause of promoting broad public availability" (*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1974)) and contrary to the legislative history of the Old Act that copyright is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public." (H.R. Rep. No. 2222, 60th Cong. 2d Sess. 9 (1909)). Only this Court, by a rehearing in banc, can correct all of these oversights, misunderstandings and errors. Apart from fairness to appellees, the rights of the American public to use the VTR, and the livelihoods of American workers in supplying it, require such correction.

Respectfully submitted,

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DEAN C. DUNLAVEY,
DONALD E. SLOAN,
STEVEN T. JOHNSON,
Attorneys for Petitioners.

4 Part II / Tuesday, October 27, 1981

Los Angeles Times

Letters to The Times

'Taping Off TV Ruled Unlawful'

Three wise and learned judges ("Taping Off TV Ruled Unlawful," Times, Oct. 20) attempt to invade the privacy of 3 million video recorder users' homes, and dictate their life style. Overnight, by taping off the air, 3 million petty criminals risk prosecution. It obviously did not occur to the judges that when "Herbie Rides Again" flashed on our screens it was not a freebee. The cost of all goods and services purchased being reflected with each . . . "and now a few words from our sponsor!" So one should have the right to watch the boobtube at any later time, complete with all "words from our sponsor."

The shame of it all—a knock at the door and being caught redhanded with a freshly recorded tape of "Hee Haw."

JOHN-PAUL LeJEUNE
Orange

•

The U.S. 9th Circuit Court of Appeals has ruled that manufacturers of video recorders may be held liable for supplying equipment which is used to duplicate copyrighted TV programs.

If this is an illegal infringement of copyright laws, would not such a ruling be applied to manufacturers of paper copy machines, such as Xerox, since such machines are assuredly used to reproduce copyrighted materials?

MARY DEAN ARMSTRONG
San Marino

•

The court failed to set punishments for the crime, since it is assumed it will go to the Supreme Court. Well, that's fine for the future, but it doesn't do any good now. We still have 3 million criminals loose on our streets, not counting the suppliers and manufacturers! There is an easy solution to the problem. All 3 million video recorder owners should go to their local police station, turn themselves in and insist they be held in jail until the courts decide on their actual punishment. The law's the law, and justice must be served!

DONALD R. LING
West Los Angeles

•

If taping off TV is ruled unlawful, that means cassette taping of music is also unlawful.

There can be no exceptions. If one is unlawful, then the other is.

So, judges, be careful how you make your decisions. You could have the whole United States public on your backs.

TOM EVANS
Arcadia

•

I suggest the defense hire the Washington lobby of the National Rifle Assn. It should prove effective in coming up with a slogan like "VTRs don't record—people do."

WILFRED COUZIN
Laguna Niguel

•

The ruling makes manufacturers liable for illegal acts others may or may not commit. The decision seems to say that since the VCRs have the potential for copyright infringement, then they do infringe. Rubbish!

DAVID HELKENN
San Diego

APPENDIX A

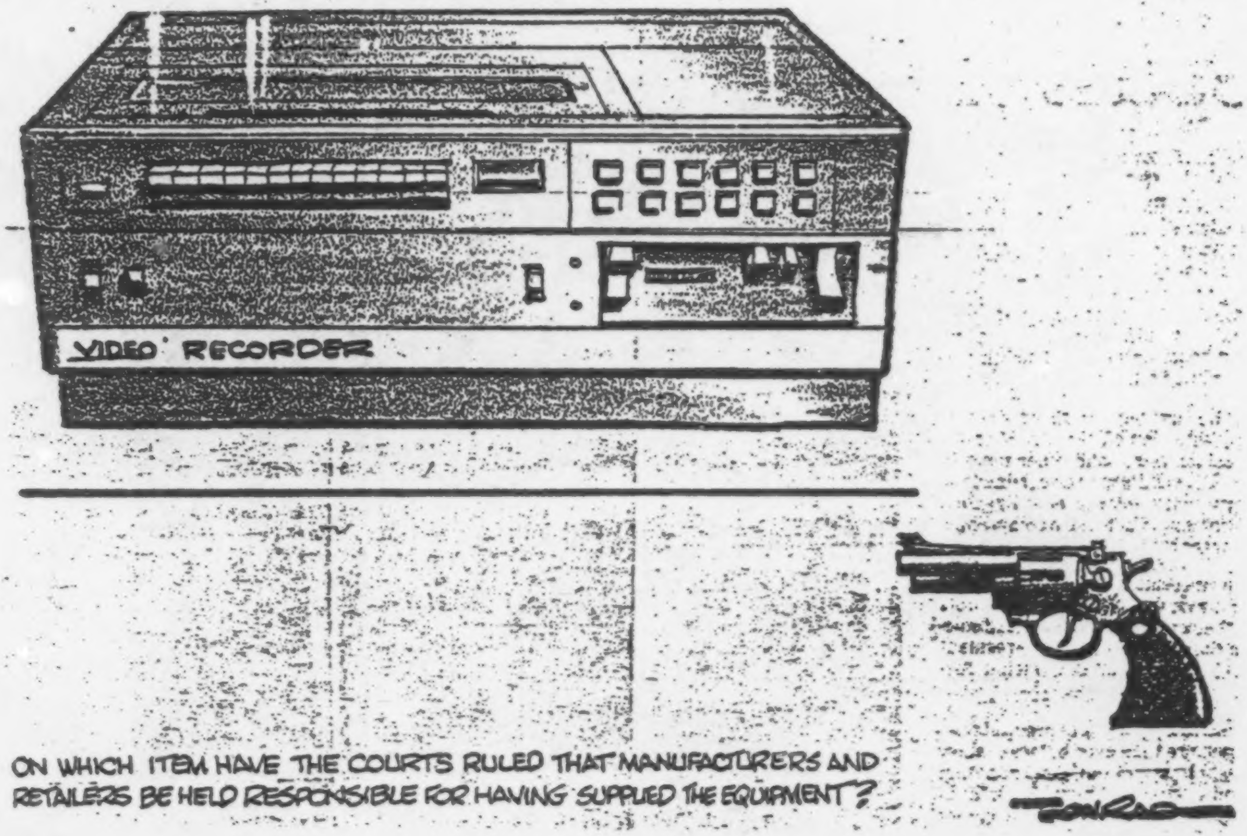
APPENDIX G

MEDIA COMMENT

This compendium of news clips, editorials, cartoons and other media reaction is a good cross-section and representative sample of the strong support that has been expressed in the American press for the consumers' right to tape.

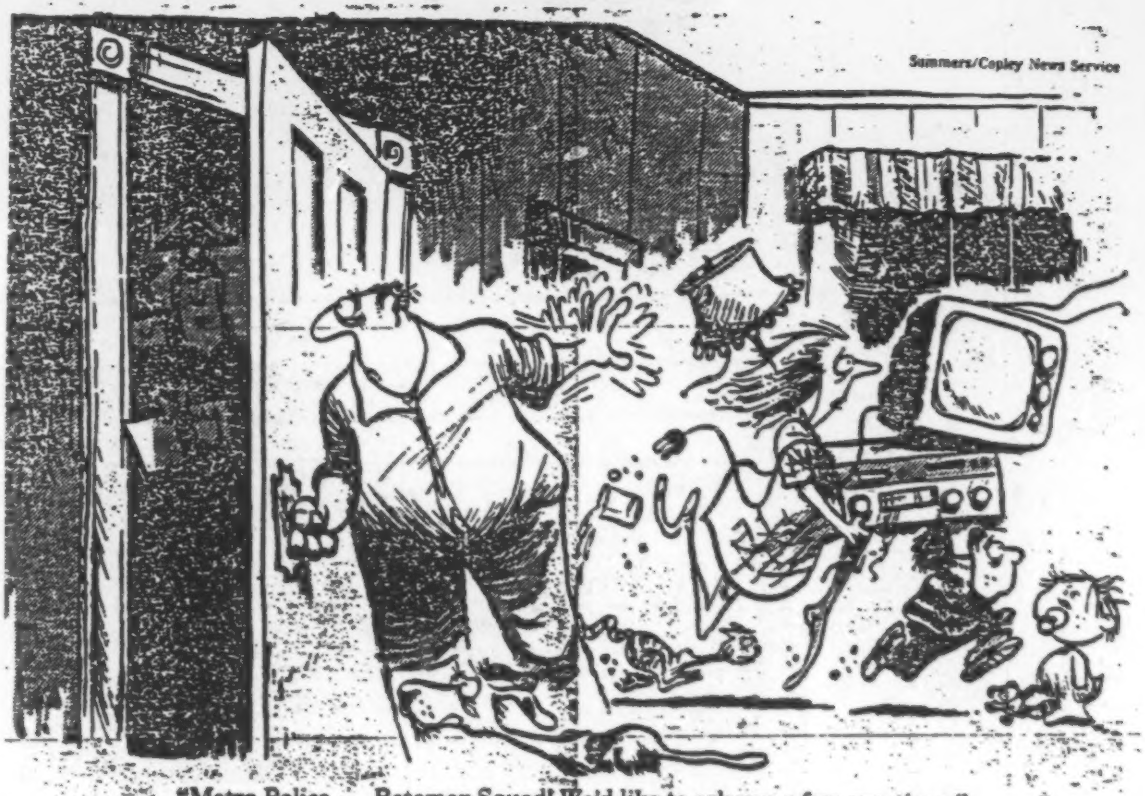
OCT 26 1981

PHILADELPHIA, PA.
INQUIRER


VIDEO RECORDER
ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?
CONRAD

NOV 6 1981

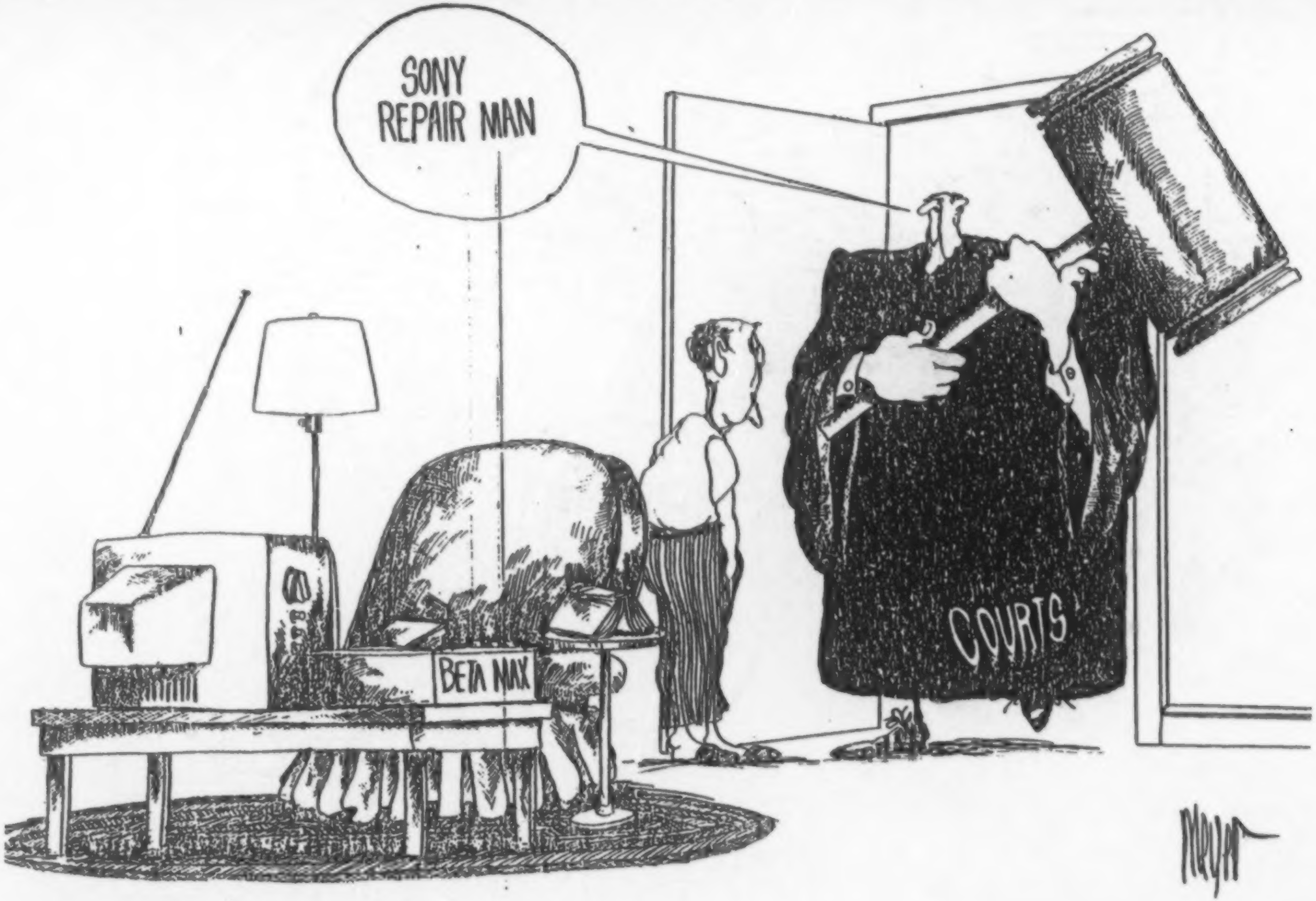
PHOENIX, ARIZONA
GAZETTE



Summers/Copley News Service

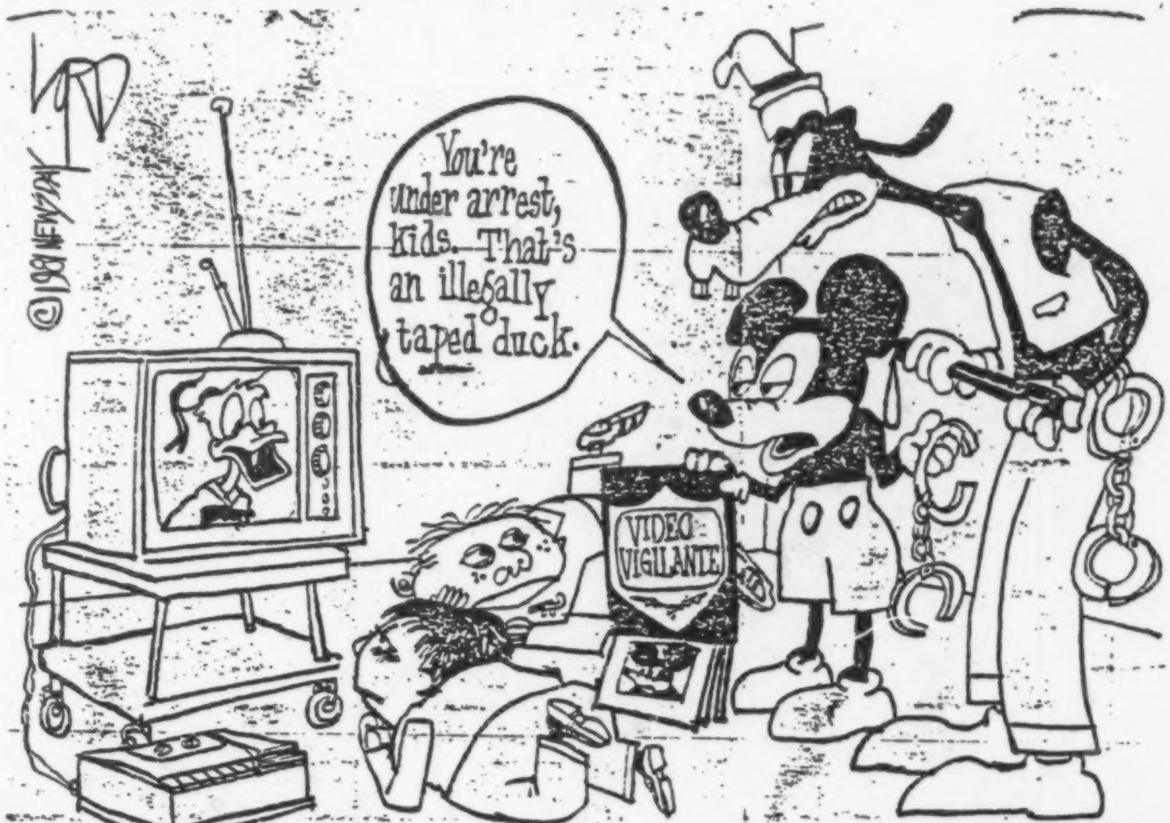
"Metro Police . . . Betamax Squad! We'd like to ask you a few questions."

San Francisco Cronicle Oct. 21, 1981


SONY
REPAIR MAN
BETA MAX
COURTS

LONG ISLAND, N.Y.
NEWSDAY

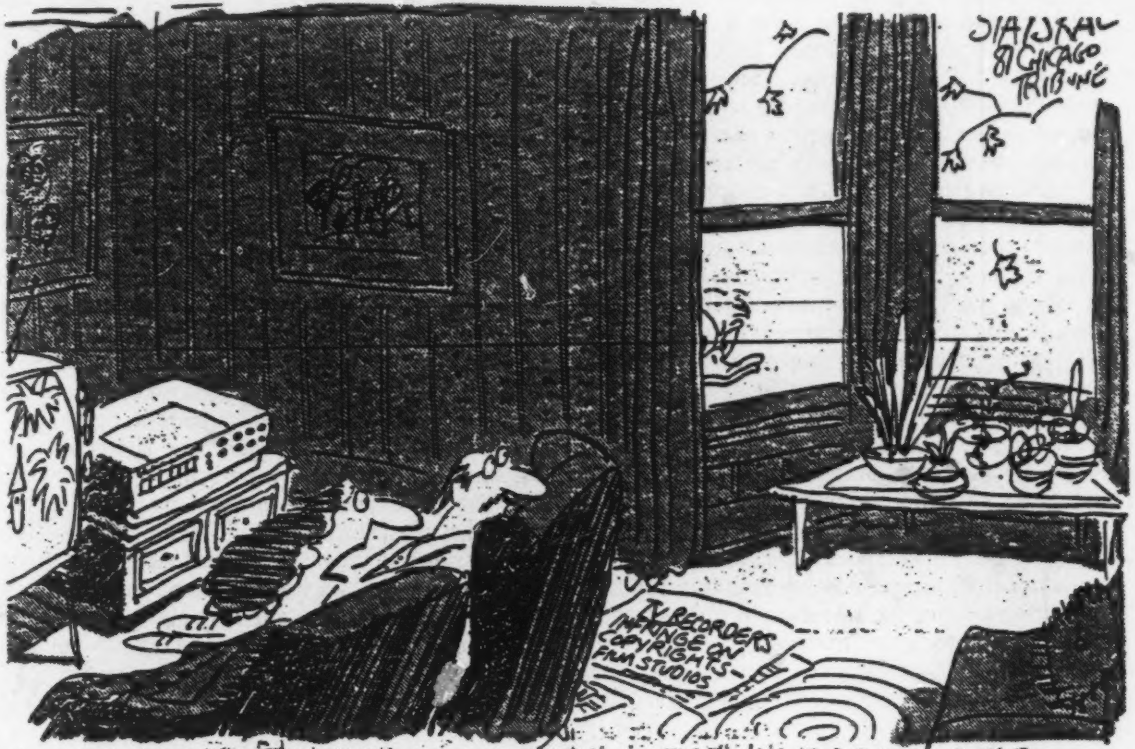
OCT 22 1981


©1981 NEWSDAY
You're under arrest, kids. That's an illegally taped duck.
VIDEO VIGILANTE

Newsday Cartoon/M.O. Lord

OCT 30 1981

MATTOON, ILL.
JOURNAL-GAZETTE


81 CHICAGO TRIBUNE
TV RECORDERS INFRINGE ON COPYRIGHTS—FILM STUDIOS

"WELL, MAYBE IT IS ONLY A DUCK HEADING NORTH FOR THE WINTER... BUT WE BETTER NOT RECORD 'THE WONDERFUL WORLD OF DISNEY' UNTIL WE'RE SURE!"

Washington Post Oct. 22, 1981

Smile—You're on Bootleg Tape

WE CAN SEE it now: the shades are drawn, the lights are low and authorities surrounding the building spot the silhouettes of four figures huddled in a semicircle on the floor. . . . Kick open that door and bust every one of them because, just as we suspected all along, it's another gang of little tykes in their Dr. Dentons—watching a videotape of a Disney movie that old mums copped off prime time a week ago. That, as a federal appeals court warned this week, is breaking the law—and never mind who's watching or where.

"We find no congressional intent to create a blanket home-use exception to copyright protection and that home video recording does not constitute fair use," said the court. Well, blanket or no blanket, those home users now total nearly 3 million, and are growing. In their number, we suspect, are people whose past records are tarnished by instances in which they used sound-only tape recorders to swipe a few ditties off the radio, or maybe ripped off a federal inspection tag from a pillow.

Ultimately responsible, though—according to this opinion, at least—are the defendants in the case, including the Sony Corporation of America, which sells Betamax recorders. The appellate court has sent the case back to U.S. District Court, directing the judge to consider damages and an injunction against Sony, its ad agency and four retail stores. Another defendant in the suit is a Los Angeles resident who owns a video recorder. The District Court judge had ruled previously that recording material broadcast over the airwaves did not constitute copyright infringement as long as the recordings were not used commercially by owners of these machines.

Now, what's wrong with that reasoning? Isn't that why the sportscasters remind us every time that their presentations are "intended for private use only and any rebroadcast . . ." etc. for any of a number of money-making or other uses is strictly prohibited? The appeals court says the defendants are liable. So where does this suit take things?

Probably into a sixth and seventh year of litigation, and into some settlement that will protect the owners of copyrights, through some compensation/royalty arrangement that protects against the worst piracy—namely, systematic, indiscriminate, multiple videocopying and distribution. This is no new area for Congress to explore—for it is similar to past legislative proposals to address Xerox and other copying devices. The rights of artists, writers, film producers and, yes, commercial sponsors, must be protected, but so should the ability of people to enjoy practical and essentially private use of information in the comfort of their homes—on tape that doesn't turn red.

New York Times Oct. 28, 1981

Tube Thieves

It never occurred to us that taping a crucial episode of "Dallas" for more convenient viewing at another hour might be a violation of the copyright law. After all, the recorders and the tape are openly sold. And the program's sponsors should welcome our watching when we can. Yet the United States Court of Appeals finds a problem of piracy, even in the privacy of the home. Broadly stated, it is that the producers of the better broadcasts may lose some of their benefits of resale, by tape or disk, if too many of us capture the show the first time around.

Clearly, technology is again outrunning the law. Federal copyright statutes do not explicitly address the new gadgets. Sooner or later, they'll have to.

Copyright laws promote science and the arts by allowing creative people to be recompensed for the repeated use of their works. As written by Congress, they also recognize that absolute control is neither possible nor desirable; too tight a law can inhibit public knowledge and cultural experiences.

Every technology creates its own version of the problem. A pencil is not usually a threat to an author, but a copying machine changes the odds. Tape recorders changed them still more, as any teen-ager's collection of pop music will attest. The law adjusted to copiers by letting schools and libraries reproduce portions of books. It has left home taping of music alone, perhaps because the industry felt it gained as much in new fans as it lost in business.

But Universal City Studios and Walt Disney Productions refused to take videotape recorders as lightly. They sued Sony and several appliance stores, arguing that the equipment infringed on the producers' copyrights. The district and appellate courts disagreed about whether the Copyright Act applied. But both found the statute unclear, which suggests that Congress had better begin to think about a policy.

Even if the theoretical problem is answered, what would it mean to "prohibit" taping in the home? Surely society does not want to outlaw taping machines; they not only "steal" good programs but also personalize viewing hours and display privately filmed movies.

Cable television and juke boxes posed a similar problem. Congress's answer was to require the payment of a modest royalty, based on gross revenues or the number of units sold. The analogue today would be to charge manufacturers of video recorders and tape cassettes a royalty, slightly raising their prices, and to pay it to the producers of the presumably injured tapes and discs.

That is, admittedly, a very rough remedy. But it points to the problems ahead. Difficult as they are, there's no point in pretending they don't exist.

Los Angeles Times Nov. 1, 1981

Millions of Outlaws

Technology has run afoul of the law, or at least one court's interpretation of the law, in the recent decision that it is illegal for people to tape television programs in their own homes. The issue is by no means resolved, but it belongs more rightly in Congress than in the courts. Congress in turn probably wishes that the industries involved would settle their own problems.

The case is a good example of how technological developments can outstrip the ability of laws to control them. Since the case was filed by two film companies in 1976, the use of videotape recorders has spread so extensively that enforcing the recent decision will be virtually impossible—and a bit ludicrous as well. There are about 3 million video recorders in American homes today.

The suit came about because Universal Studios, a unit of MCA Inc., and Walt Disney Productions claimed that people who tape their films and programs in their own homes are violating copyright laws, and that Sony Corp. and certain retail stores are liable for that infringement because they make or sell Betamax videotape recorders. Actually, RCA Corp. now sells the most videotape recorders in the United States, but it did not figure in this case because it entered the market a year after the suit was filed.

The film companies also contended that they would lose markets for their products if people sat at home watching programs that they copied earlier.

The U.S. District Court in Los Angeles heard the case first. After three years of litigation, Judge Warren J. Ferguson concluded that neither old nor new federal copyright law, nor the legislative histories of those laws, forbids home taping for private use. For example, the judge cited a discussion that two congressmen held on the House floor in 1971.

Rep. Abraham Kazen Jr. (D-Tex.) asked, "If your child were to record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?"

Replied Rep. Robert W. Kastenmeier (D-Wis.): "This is not included in the bill."

Last week, the U.S. 9th Circuit Court of Appeals overturned the district court. Resorting to legislative history, as the district court had done, was entirely unnecessary because "the statute is clear and unequivocal," the appellate court said. Federal law clearly gives copyright holders exclusive rights to reproduce their work and distribute any copies, the court said, adding, "We find no congressional intent to create a blanket home-use exemption to copyright protection. . . ."

Further court review is a possibility, given these conflicting opinions. But the most obvious solution is for Congress to say what it means. Bills have already been introduced to exempt from the Copyright Act of 1976 any videotaping for private, noncommercial use, and that approach makes good sense.

Where does this leave the people who finance, direct, act in and distribute films and programs shown on television? They argue that they should share in the profits of their work. The appeals court agreed, and directed the lower court to devise some financial relief for at least the film companies involved. If Congress does exempt home videotaping from copyright protection, it may decide that the bill makes moot the royalty question, or it may decide to set guidelines itself.

A note of realism is in order here. The district court judge provided one when he wrote: "The new technology of videotape recording does bring uncertainty and change which, quite naturally, induce fear. History, however, shows that this fear may be misplaced."

We hope that the same fear does not leave the country with an unenforceable decision.

Chicago Tribune

Friday, October 23, 1981

Everyman a copyright infringer

A federal court of appeals has just jolted the highly competitive home videotape industry, ruling that it is illegal to tape broadcasts covered by copyright without paying a royalty to the copyright owner.

This is the latest in the law's troubled efforts to catch up with sprinting communications technology. Already the photocopy machine has made it possible for anyone to pirate copies of articles and books. Home cassette and reel to reel audio tape decks hooked up to record from the radio have made everyman his own record producer. And now the ready availability of home videotape machines is beginning to make television programs fair game.

The idea of the copyright law is to give the creators of prose and poetry and music and drama a monopoly over their work for a specific period of time so that they will have an incentive to produce it. If everyone can make copies of the work without paying a royalty, that incentive is diminished.

The federal appeals court in San Francisco merely ruled that the copyright law passed by Congress did not create an exemption for home videotaping of television programs. If this interpretation holds up in the U.S. Supreme Court, some mechanism for paying royalties will have to be found unless Congress amends the law to create an exemption.

It will take some imagination to come up with such a mechanism. It is impossible to know, for example, who is taping what in the privacy of their own homes. If a fee is tacked onto the price of every recording machine or every cassette sold, this will unfairly impose a payment on those who use their recorders to make home recordings of their children growing up or to play tapes purchased or rented from firms that do pay royalties.

As with the photocopy machine and the audio tape deck, there is a problem of spending dollars to collect dimes. Each individual, noncommercial royalty payment would probably be quite small, but the cost of a system to collect them might be large.

The federal appeals court in San Francisco was not wrong to grapple with the issue. It was only doing its job in interpreting the law Congress gave it. But the courts cannot fashion a complete settlement of this issue. It will take the kind of compromises and negotiations that Congress specializes in to balance all the interests. Congress should have another go at the copyright law to try to come up with some solution to the problem that will preserve the creator's monopoly over the fruits of his work while not robbing people of the convenience that the new technology offers.

The decision in San Francisco should not be allowed to put the videotape industry on freeze frame. It should get Congress going on fast forward to amend the law to keep abreast of technology.

OCT 22 1981

CHICAGO, ILL.
SUN-TIMES

Needless static on TV recorders

Absurdity sometimes tinges court decisions, especially when the law lags behind technology. One such ruling came in California this week, when a U.S. Court of Appeals reversed a lower federal court decision about the Betamax video recorder produced by Sony.

The appeals court ruled in favor of the two film studios that started the suit five years ago. It said Sony, retailers, advertising agencies and private users of videotape machines could be liable for copyright infringement if they recorded TV programs off the air.

Under copyright law, unauthorized duplication of protected materials *for profit* is of course illegal. Monday's decision, if upheld, extends that idea greatly—and with a twist.

By holding Sony liable, it presents some interesting questions. Do we sue Xerox because someone *could* copy the Sun-Times illegally? Is Kodak liable for illegal photographs? Is Memorex guilty if someone wrongly dubs an Ella Fitzgerald tape?

Obviously, film studios can't go after individual owners of the 3 million video recorders now in U.S. use. Thus Sony, plus other recorder-makers sure to be mentioned in further action, become high-profile targets.

The appeals court told the lower court to work out some remedy for the studios. We wonder how, in fairness, it can be done, considering that no one can say with certainty how any particular video recorder will be used. And it's too late for a total ban on the machines: The video revolution is rolling right along, and there's no rewind button on it.

That's why we suspect the California decision won't stand—either in a Supreme Court reversal, or because Congress can rewrite communications law to protect innocuous, not-for-profit use of home video machines.

• • •

The Wall Street Journal Oct. 28, 1981

TV Tape and Red Tape

When we read the other day of a court ruling which, if upheld, could possibly result in putting Sony Betamax salesmen in jail, we decided that something misfired in the judicial process. How could it be that manufacturers, retailers and users of videotape recorders could be in violation of federal copyright law any more than sellers of photocopiers or audiotape recorders?

The dichotomy is the result of poorly written law, inconsistent court decisions and the legal challenges presented by the rapid advance in technology. Last week's ruling by the Ninth U.S. Circuit Court of Appeals in California, which declared that home use of videotape recorders violates the copyrights on movies and television programs, shows that Congress and the courts have yet to come to grips fully with the conflict between the use of modern technology and established copyright monopolies.

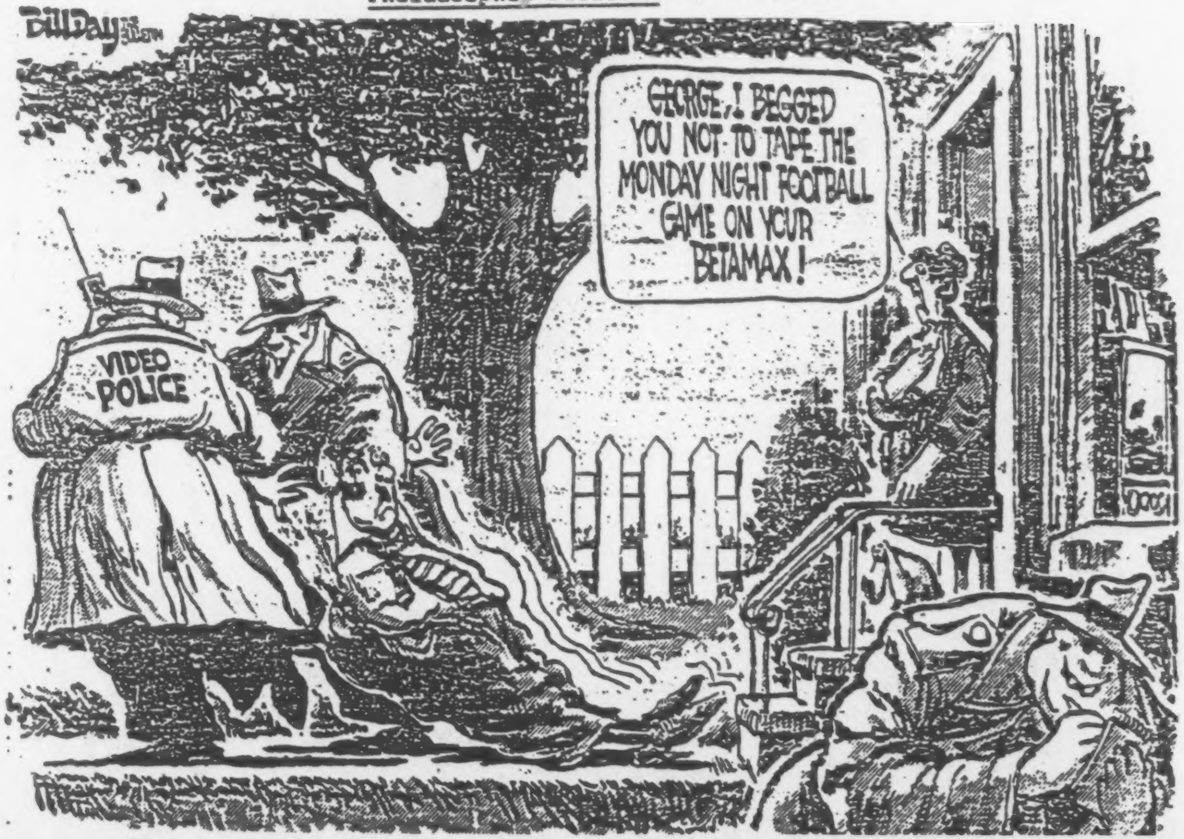
The quintessential law of copyright —and patents—is contained in the Constitution: "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right of their respective writings and discoveries." The Supreme Court has said, "The economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."

The intent of the law is to help advance the public good and not to safeguard self-aggrandizement. To this end, however, the law recognizes that some amount of economic monopoly must be afforded to writers, artists and scientists if the public good is to be well served. Who would devote so much time, energy and money to art and science if the fruits of these labors could be freely exploited by someone else for personal gain?

The copyright laws written by Congress have often been ill-suited to achieve these joint goals. As a result, the courts have created a doctrine of "fair use," which basically permits a limited infringement on "exclusive rights" to copyrighted material for private, non-commercial use. From 1955 to 1976, Congress worked on new copyright legislation in the hopes of clarifying some of these conflicts between the copyright holder's rights and the rights of the public to use the material. The unsatisfactory results of Congress's work is a copyright law that is even more confusing than before and that still fails to keep up with the advances of technology. For instance, a special exemption is given for the recording of sound broadcasts and recorded material at home by audio-tape recorders. But Congress did not even mention videotape recorders in the legislation.

The Sony case will probably end up in the Supreme Court. We would hope the judges would ignore much of the legalese that now engulfs copyright law and reflect instead on the intent embodied in the Constitution. The development of videotape recorders certainly contributed to the public welfare. It is doubtful that their use by millions of Americans at home will somehow adversely affect the development of science and the arts.

Washington Post Oct. 31, 1981
"The Drawing Board Op. ed. page
Philadelphia Bulletin Oct. 21, 1981


BillDay
GEORGE, I BEGGED YOU NOT TO TAPE THE MONDAY NIGHT FOOTBALL GAME ON YOUR BETAMAX!
VIDEO POLICE

BLIND JUSTICE / The video recorder verdict

Watch it! You can be sued for taping TV!

The decision against home video recording of copyrighted material is virtually unenforceable.

The 9th U.S. Circuit Court of Appeals in San Francisco ruled, in almost unfathomable legalese, that "off-the-air copying of copyrighted audio-visual materials by owners of videotape recorders in their own homes for private non-commercial use constitutes an infringement of . . . copyrighted audio-visual materials."

The three-judge court also said the "fair use" doctrine, which allows the use of copyrighted materials for teaching, news reporting and research does not include home recording.

That means that millions of video recorder owners can be sued for using them and the manufacturers can be sued for making them.

The appeals court sent the case back to the district court, telling it to consider an injunction against further manufacture and sale of video recording machines. It also told the lower court to consider damages for Universal Studios and Walt Disney Productions, which sued Sony Corp. for producing its Betamax recorder.

The decision should have little effect on the estimated eight million Americans who already own video recorders.

How can the court force them to stop using their recorders? Will it send detectives to spy on Americans in their homes? Of course not.

Can the court determine if a recorder is being used privately or commercially? No.

Using the same legal logic, you could argue that tape recording music from your radio is an infringement, as well.

The court is going after the wrong persons. The average American has no intention of selling TV recordings. Most watch them at home. They usually record shows they missed while they were away.

The villains the courts should go after are the pirates who sell stolen programs. They are the ones who profit at the expense of the movie and TV industries. A court injunction against making and selling recorders will only drive them underground — and raise their cost, already at $600 and up.

The decision undoubtedly will be appealed. It may be up to the Supreme Court to overturn this ridiculous ruling.

ST. LOUIS, MO.
POST-DISPATCH
D. 253,948—S. 430,711
ST. LOUIS METROPOLITAN AREA

OCT 21 19[illegible]

Technology Overtakes Law

The U.S. 9th Circuit Court of Appeals in San Francisco has rendered a decision that makes the producers of copyrighted television programs happy but that, understandably, has caused consternation in the industry that manufactures, advertises and sells devices making it possible for millions of American households to enjoy TV shows after they have been broadcast. The device that prompted a suit by Universal Studios and Walt Disney Productions is the videocassette recorder (VCR), which enables consumers to record TV programs for later viewing.

Overturning a lower court decision, the appellate court ruled that makers, distributors, sellers and ad agencies are liable for damages if the machines are used to tape broadcast programs that are copyrighted. Even VRC owners who tape such programs at home only for private use are infringing the copyright law, the court said. But a plaintiffs' lawyer was quick to say that the entertainment companies are not seeking damages from private users, although a private individual is one of the several defendants in the suit. Defendants in the suit include Sony Corp., a Japanese firm that makes the Betamax video recorder; Sony Corp. of America, the U.S. distributor; four retailers and an advertising agency that points out the advantages of home recording for later viewing.

With an estimated 3.5 million VRCs already being used in American homes and with 1.5 million more units likely to be sold this year, the appellate court decision, which seems almost certain to go to the Supreme Court, obviously could have a broad impact. The impact could be even wider if the court's rationale were to be applied to photocopiers. In its decision, the 9th circuit court told the district court judge to "fashion" some form or relief, which might consist of damages or an injunction against the defendants. The court also suggested the possibility of manufacturers making royalty payments to the owners of shows.

This case seems to be one in which technology has made the law obsolete. The appellate court may be following the law. But to make manufacturers liable for a machine that can be used legitimately — for purposes other than infringing on copyrighted material — seems to be stretching legal doctrine. To use a crude but apt analogy, it's akin to making the manufacturers of carbon paper liable because the paper may be used to duplicate copyrighted material. Holding consumers potentially liable for recording programs for their own use also seems far-fetched — although consumers are likely to be protected out of respect for the privacy of the home.

Copyright owners are probably entitled to some protection from the misuse of VRCs. The real offenders against the copyright law, however, are those who record copyrighted material and then sell or distribute it — not those who make a useful machine and those who privately employ it for their own convenience. Perhaps the courts can fashion a remedy that is fair to copyright owners, manufacturers and users. But the ultimate remedy may have to be provided by Congress in a law that recognizes copyright interests but allows enjoyment of the benefits of recording technology without placing excessive burdens upon it.

SALT LAKE CITY, UTAH
DESERET NEWS
D. 70,000
SALT LAKE CITY METROPOLITAN AREA

1981

Outlaw those videotapes?

The appeals court ruling handed down this week, placing all home video recording equipment under a cloud of copyright violation, is not the last we will hear of this matter. An estimated three million of the recording sets are in use throughout the country, and more are being sold every day in the absence of any injunction against them.

The 9th U.S. Circuit Court of Appeals in San Francisco reversed on Monday the decision of U.S. District Judge Warren Ferguson, who had opened the door to the manufacture and distribution of the equipment. He had ruled that even if home video recording did infringe on copyrights, the defendants were not liable for damages. The defendants in the suit include Sony Corp., a manufacturer; four retailers; an advertising agency; and William G. Griffiths, a video recording equipment owner.

Plantiffs in the marathon suit that began several years ago are two moviemakers whose productions are shown on television. They contend that home taping of television shows is a violation of the copyright laws. Most television programs are copyrighted.

The appeals court sent the case back to the district court with instructions to come up with a solution to this highly complex problem. One of the complexities is the fact that home recording of programs on audio tape is legal. By a peculiar twist of logic, only the videotape recording is considered by the court to be a violation of the copyright law.

That's absurd. If TV viewers want to record a program for later viewing in their own home, why should they be prevented from doing so? And certainly they ought to have the right to purchase equipment that will allow them to do so.

The place to enforce the copyright laws in this instance should be in the use, not the making, of the recording. Certainly commercial use of such a recording is a violation and should be punished. But to tell a citizen he can't record a program to watch later is the most obnoxious kind of Big Brotherism.

POUGHKEEPSIE, N.Y.
JOURNAL
D. 39,575—S. 51,135
POUGHKEEPSIE METROPOLITAN AREA

OCT 21 19[illegible]

A blow against Betamaxes

What's going on here?

A federal court in San Francisco ruled Monday that taping television programs on home video recorders — Sony Betamaxes and the like — is an infringement of the copyright laws.

In a decision on a suit brought against Sony Corp. of America, the court said the manufacturers of the machines and those who sell them may have to pay royalties to the people who hold the copyrights to the TV shows.

We think the ruling goes a little too far.

If Sony and other companies who make video recording devices — as well as the stores that sell them — have to pay royalties to television companies, the cost of the product will obviously rise, perhaps prohibitively. And fewer people will be able to buy them.

We can understand the television companies' objections to someone taping a movie or a football game and then charging admission for re-broadcasting it. That would constitute unfair competition, since the person who records the program has no production costs and can therefore undersell the company that produced the program in the first place.

But what about the average viewer who simply wants to watch a program more than once.? Who is he hurting by doing that?

We don't think the people who wrote the copyright laws ever intended to restrict the average Betamax owner from taping a Mary Tyler Moore rerun in his living room and then watching it again two days later.

The federal court ruling — which is bound to be challenged in the U.S. Supreme Court before the issue is decided — would protect a few business interests in Hollywood and elsewhere at the expense of millions of televison viewers who have no interest in competing with them.

We don't think this is how the country's justice system should work. We wish the federal government would leave our Betamaxes alone.

KINSTON, N.C.
FREE PRESS
D. 13,461 S. 13,481

OCT 21 1981

Video Recorders

It's so stupid it hardly bears comment.

We're referring, of course, to a decision of the 9th U.S. Circuit Court of Appeals in San Francisco Monday that the makers of home video tape machines could be required to pay royalties to the owners of television programs or even be forced to halt the manufacture and sale of the devices.

Sony Corp., maker of the Betamax home video recorder, said it plans to fight the decision, which could affect some 3.5 million American households. The case is expected to go to the U.S. Supreme Court.

The three-member federal panel said Universal Studios and Walt Disney Productions had the right to sue Sony, four retailers, an advertising agency and a viewer for unfairly taping copyright TV shows. It concluded the "fair use" doctrine, which allows use of copyright materials for teaching, news reporting, scholarship, research and other noncompetitive uses, did not include home video recording — even for personal enjoyment.

The ruling opens up a whole can of worms in the entertainment industry. Video recording is the hottest thing going right now in the electronics market. You can do so many things with one — record off the air, show home movies. It's really a family entertainment device. The price of the machines has dropped from an average price of $1,500 three years ago to $800 to $1,000 now and will probably continue to decrease due to technological and mass production advances.

Video makers and users fear the ruling will lead to copyright laws regulating the taping of television shows for personal use. Also, enactment of the ruling could ultimately lend precedent to similar restrictions on audio recorders, backed by record makers worldwide.

Many of us, of course, are unconcerned. We don't own a video recorder and it doesn't affect us. Anyway, enforcement of those laws would be impossible in America, home of the brave and the free. Right?

Is it impossible? They don't have home video recorders in Russia.

Do they?

KING OF PRUSSIA, PA.
TODAY'S POST

OCT 21 1981

Copyright, copywrong...

Technology suffered a setback in a California court this week. So did common sense.

A federal appellate court in San Francisco ruled Monday that home videotaping of TV shows — even for private use — is a copyright infringement. It wants movie producers and TV NETWORKS COMPENSATED FOR WHAT IS PRIVATELY TAPED — a virtually impossible edict. There is little doubt that the case will go to the Supreme Court, where we have to hope the clash of rights here will be properly sorted out.

A copyright is an important protection against the theft of literary, musical and artistic works that float in the public domain. It is an essential right, just as patent laws are necessary to protect tangible products, and the TV and movie people do have their rights to be considered.

The concept to focus on here though is theft. Most videotaping is done for personal convenience. People tape shows or events they would otherwise miss, and erase them afterwards so that the tape can be reused. There does not seem to be general "pirating" of TV shows for economic gain.

In this way, the TV and movie producers would seem to be beneficiaries rather than victims of home videotaping, since the audience — for their programs as well as their commercials — is increased. The court's opinion that owners of recorders would gain "economic control" of the shows they tape is just far-fetched.

The impact of the ruling, if it is allowed to stand, could be enormous. There are an estimated 3.5 million videotape machines in America homes, and another 1.5 million are expected to be sold this year. Because it would be impossible to charge people royalty fees every time they taped a program, the court suggests a royalty payment as part of the purchase price. That would be a token approach, based on a presumption of guilt which smacks of "sentence first, verdict afterwards."

The implications also reach out to simple tape recorders and photocopy machines. How do we protect against "copyright infringement" here, and how could a fair "compensation" rate be established when some people may use the machines to duplicate copyrighted material but others not at all?

The Supreme Court has a sticky precedent to wade through here: it has to find a way to give reasonable protection to copyright holders, without unduly punishing everyone for assumed abuse. It's the kind of complexity our technological world abounds in, but common sense is still the best guide through the maze.

MARTINEZ, CA.
NEWS-GAZETTE

Greed Winning

It is a violation of copywright law for the owner of a videotape recorder to copy a program off the air for later viewing and enjoyment, a U.S. Court of Appeals in San Francisco has just ruled, overturning a lower court decision that such copying for personal use only did no damage and was not, therefore, illegal.

The producers of TV programs are ecstatic. But they are realistic enough to understand that it may require a Supreme Court decision to confirm them in their greed. For that, it seems to us, is what has been approved.

The Appeals Court held that they are in the business of supplying entertainment and that reusing the entertainment they provide is a violation of their right to profit. We have carefully studied the material which appears on televisions and would challenge the Court's acceptance of the position taken by film and television producers that they are in the entertainment business.

TV films and programs are designed to attract audiences to which their sponsors can make a pitch for the products they sell. Thus the programs are not designed to entertain but to sell goods and services. When program producers have been paid for attracting an audience, they are fully compensated. The TV industry recognizes this. Programs which deliver the most viewers cost the advertisers the most.

The entertainment content of programs and films aired is at best accidental and often negligible. Since they are not sold as entertainment, if an individual records them for personal entrtainment and makes no profit from doing so, then as with patents no liability should accrue from personal use.

Carried to its logical extreme, the Appeals Court decision would forbid singing a copyrighted song to one's self in the shower. But there's still the Supreme Court to see this or Congress to protect our rights as individuals against corporate greed.

PORTAGE, PA.
CRESSON MAINLINER

OCT 28 19

Technical Difficulties

Two years ago, a federal district judge in Los Angeles ruled that taping television shows on home videotape recorders is not an infringement of copyright laws. Recently, the 9th Circuit Court of Appeals ruled just the opposite.

Taping of televised movies and other programs is indeed unlawful, say the appellate judges. Moreover, they ruled that the manufacturers of videotape recorders are responsible for the infringement and should pay royalties to the owners of material recorded on the equipment they sell.

We think the district judge was right in the first place. Taping television shows for personal use is not substantially different from taping music from a radio. Congress and the courts have established in the past that audio recording in the home is a "fair use" of material otherwise protected by copyright.

The test, of course, is whether the tapes are used strictly for personal entertainment. If they were sold or exhibited in any commercial way it would be a clear infringement of copyright — but by the person using the tapes, not by the manufacturers of the equipment.

Old concepts of copyright protection are going to have to yield to advancing technology. Video recorders are posing the same challenge to the entertainment industry that photocopiers have posed to the publishing industry. Policing the noncommercial reproduction of broadcast or published material under copyright is well nigh impossible, and an attempt to enforce copyright laws at that level would be at best a nuisance and at worst an infringement on personal freedom.

The videotape case, pitting producers of movies and television shows against equipment manufacturers, has been in the courts since 1976, and we probably have not heard the last of it. The manufacturers are expected to take the issue to the U.S. Supreme Court, where we can hope the "fair use" doctrine will be given broader interpretation than it received in the Court of Appeals.

OCT 27 19

WOOSTER, OHIO
RECORD

Reruns

A U.S. COURT has ruled taping television programs on a home video recorder violates copyright law.

Unless this decision, which overrules a lower court finding, is overturned itself, it will change profoundly the video recorder industry.

Obviously, it would be nearly impossible to enforce the ruling at the home level. How is anyone to know if someone uses a recorder to tape a television program so he can view it later in his own living room? Even to make efforts to find out would be to establish a chilling precedent for censorship and violation of privacy. Not only would Big Brother be watching, he would watch what you are watching.

On the other hand, it is difficult to see how an easy settlement could be reached between filmmakers, distributors and television networks on one side, and video recorder manufacturers on the other.

Making and selling video recorders is a growth industry. It would be unfortunate for the manufacturers and the public which wants machines if the industry were killed by the court's decision. Some compromise should be achieved, also, lest a precedent be set for even greater limitations. The possibilities in the area of photocopying and tape recording are enormous and ominous should future rulings go even further.

Authorities out to wipe out video recorders

WASHINGTON, 1984 — It is the third year of our persecution, oh my brothers, oh Betanauts and Betalogues and fellow members of the Betanese Liberation Front. Still they come, the gray men in the greatcoats, the storm troopers in their clodhoppers, and the brownshirts, and the grayshirts in the brown coats and still they seek us out and pick us off and cart away our "Goldfinger" and our "Roots" and our "Great Muppet Caper."

Three years, oh my brothers, since the decision banning home video recording of TV shows was handed down by a three-judge panel (combined I.Q.: 30) of the U.S. Court of Appeals in San Francisco. Three years since 5 million of us went underground with our Betamaxes, VHS's, our blank tapes, our patchcords, our satellite dishes and our whizzmagidgets. Three years on horizontal hold.

They staged another air raid last week my brothers; they flew low over the subterranean cubicle in the dread, bulk eraser plane, another of those converted AWACS they never did sell to Saudi Arabia. Their giant magnets swept our betacombs hoping to wipe away our "Fantasy Islands," our Johnny Carsons, our "Masterpiece Theatres," our Mister Bills and our Richard Simmons shows.

On The Air

By Tom Shales

But we of the fourth sector of the third quadrant of the 17th collective of the underground guerrilla band known as Betanoids, we cling to the words of wisdom of our spiritual leader whom we have seen on the tape called World War II. It was our beloved Sir Winston S. Churchill who said, "We shall fight on the beaches, we shall fight on the landing ground, we shall fight in the field and in the street, we shall fight in the hills;

"We shall never surrender."

Erasers after hidden tapes

The news is not good, oh my brothers. Comrade Joseph K returned from the front yesterday and reported that the combined military forces of Walt Disney Productions and Universal Studios moved in with their dwarfs and mice and Incredible Hulk and let fly with the dread bulk erasers on a hidden cache of tapes stored behind a Piggly Wiggly. There went 132 episodes of "The Mary Tyler Moore Show" up in a cloud of electrons. It was almost more than Joseph K could take, and this is a man who bought Polaroid at 122 — the camera, not the stock. The now-forbidden camera and the illegal Xerox machine are hidden with the tapes.

They even got our last surviving copy of Ronald Reagan's first Inaugural address. Brothers, it was so much better than the second.

Another speech on the radio today by Jack J. Valenti, president of the Motion Picture Association of America. He called for us to come out of hiding, carrying our tapes over our heads, he said the war against video liberation was costing the movie companies billions of dollars a year — a full 1.3 percent of their profits — and he said again, "The petty interests of 240 million Americans must not be allowed to stand in the way of private enterprise and big business."

The fight goes on. Only yesterday Sister Henrietta K was charged with illegal time-shifting. She had been caught red-handed setting her Betamax timer to record soap operas in the afternoon so she could watch them later that night when she got home. She pleaded guilty to conspiring to watch the soaps without sitting through the commercials for Carefree Maxi pads, Massengill douche and Porcelana fade cream.

They not only confiscated her Betamax, they appropriated her Trinitron.

Sentence was prime-time TV

Poor Henrietta was sentenced to three hours of hard labor a night — watching the network prime-time schedule exactly as the network scheduled it, and with no fast forwarding through the commercials. Oh my brothers! They propped her peepers open with toothpicks and dabbed her face with Kleenex as the tears of boredom rolled down her cheeks.

What was it our beloved Winston S. said? "And now they even attack my little dog Falla." No, no — it was, "Never give in. Never give in. Never, never, never, never." Or was it, "Never, never, never, never, never"? Well, it was never give in, just the same.

And so we wait, oh my brothers, we wait for the terror from Hollywood, our nation's capital, to come again in the night. Even Mike Wallace is on our trail now; creepy-peepy cameras roam the countryside; the Eyewitness News jet-propelled traffic-copter scours the landscape. Comrade Hector K thinks he even saw Magnum P.I. casing the terrain in his Ferrari.

"Charlie's Angels" are hidden under the bed. Benny Hill is in the closet. "The Ten Commandments" are buried in the backyard. I have cleverly disguised a videotape of "Fahrenheit 451" as a book.

They only told us we could pursue happiness, oh my brothers; they never did say we could record it and play it back.

COCOA, FLA.
TODAY
D. 63,776—S. 74,355
MELBOURNE COCOA METRO AREA

NOV 1 1[illegible]

Film critic points out holes in ruling on home movie taping

By Ron Miller
Knight-Ridder News Service

One of the most ignorant court decisions in recent years has to be the one that ruled movie studios are entitled to damages from the makers of video cassette recorders.

It's a bad ruling and should be overturned when it finally arrives at the U.S. Supreme Court. In the meantime, though, it will cost the makers of VCRs thousands of dollars more in legal fees and probably an untold amount in distribution deals that won't be completed while the court case is still hanging fire.

The ruling Oct. 19 by the 9th U.S. Circuit Court of Appeals in San Francisco is ridiculous on a number of grounds. For example:

—It would levy a penalty against the manufacturers of equipment for illegal uses that "might" be made of its machines. This is like imposing a royalty on the makers of firearms on the notion they might be used by game poachers.

—It seeks to levy damages that are presumed, not demonstrated. That's because the damages are nondemonstrable. How do you know somebody didn't watch a movie in reruns because he taped it off the air the first time the network showed it? It's all supposition and real damages never could be proved.

—It sets up a different legal standard for recording a TV program than is accepted for recording a radio broadcast on audio tape.

—It shifts the weight of the law onto the very act of copying something, not the copying of something for distribution, which is the real protection copyrighting is supposed to guarantee.

Moreover, the lawsuit filed in 1976 by the Universal and Disney studios against Sony Corp. and various smaller arms of its distribution organization is now hopelessly outdated by the booming VCR industry. In 1976, Sony was the only maker of VCRs sold in the United States. Today, it's not even the biggest.

The studios claim they make most of their profits not on the network plays of their programs, but on the syndicated resale of them to local stations. They contend that the taping of their shows hurts that syndication market.

Although it's true that the studios make their profits in syndication, it's insane to suggest the use of VCRs materially hurts that market. Most VCR owners tape shows because they're on opposite something else they want to watch or because they won't be home to watch anything. In other words, most VCR users tape a show to watch it once, not several times.

If watching a show once really hurt its value in syndication, the syndication business would have collapsed years ago. The studio's theory presumes that all VCR owners build up vast libraries of weekly sitcoms and watch them over and over again. That's just not true. Most people use a tape once, watch the show, then erase it.

Universal, Disney and the other studios that joined them later in their lawsuit have actively entered the video cassette market themselves since the suit was filed. If their suit prevails, it will force the cost of VCRs up because manufacturers will have to pay royalties to the studios. They're bound to lose more than they'll gain if VCR sales are slowed as a result.

I'm most disturbed by the faulty reasoning that led to the appeals court decision.

If I like "Valley of the Dolls" so much that I want to sit down and type out a second copy of it, how does that hurt sales of the book? I've already acquired a copy and paid for it. If I give that typed copy to somebody else, that's entirely different. But there's existing law to protect the distribution of copyrighted material.

The court decision really makes new law by extending that copyright protection into the home. Under this new principle, the manufacturer of my typewriter should have to pay a royalty to the publisher of "Valley of the Dolls" because I might decide to use his machine to type out a copy of the book.

—The same absurd reasoning might be applied by record labels to force the makers of audio tape recorders to pay a royalty for the possible use of their machines to tape albums off FM radio stations.

In the case of the network telecast of a TV program, the viewer is "paying" for his first viewing by watching the commercials inserted by the network. If he sees it the next day on tape instead of at the time of the original telecast, he's still paying the same fee.

What the studios really want to do is institutionalize their poor business practice of deficit financing by forcing the makers of VCRs to subsidize it. If they made their shows at a cost that would permit them a profit off the network licensing fees, they would have no argument with the VCR owners.

In the area of movies, Disney already knows how to beat the VCR problem without using a royalty system. Disney simply refuses to allow some of its most valuable movies to be shown in their entirety on home television. You can't tape what isn't there.

As a result, the Disney animated classics like "Snow White and the Seven Dwarfs" ought to be hot sellers on the cassette market.

LAS VEGAS, NV.
REVIEW-JOURNAL
D. 79,000 — S. 86,000
LAS VEGAS METROPOLITAN AREA

Taping TV and Law

By BOB WISEHART
Times National News Service

The latest lightning bolt hurled down from Olympus by the legal beagles means this: If I break the law, it's Sony that gets the view through the barred windows.

This is OK with me. It's like saying if I use a credit card and pick a lock on a door — I've seen that done on TV, but I can't figure out how — and get caught by the cops it's the friendly folks from Visa who'll go to the slammer.

Here is the story: The 9th U.S. Circuit Court of Appeals recently turned the fire hoses on the guerrillas of the video revolution by ruling that every time any one of the 3 million folks who own videocassette recorders records something, he or she is a crook.

I'm paraphrasing, naturally. That's always necessary when dealing with the flatulence of lawyerspeak and judge chat.

The three-judge appeals court in San Francisco ruled that every time you tape a show or a movie from the TV set you are infringing on the copyright.

UNIVERSAL AND Walt Disney Productions charged that the Sony Corp., maker of the Betamax home video recorder, is the ringleader of a nationwide den of thieves whose only purpose is to record what's on TV and watch it later.

They call that "time shifting." It sounds like something weird H.G. Wells once wrote about and that ought to be illegal on general principles anyway.

The judges also ordered a lower court judge — who two years ago ruled this was all a lot of hooey, though it took him 102 pages of opinion to do it — to "consider" damages against the defendants, including Sony, four retailers, one advertising agency and one lone consumer.

Does this mean that stormtroopers will batter down our doors and confiscate our "Casablanca," our "Sensuous Nurse" and — oh horror! — all our episodes of "General Hospital?"

It ain't necessarily so.

But what happens now?

The same thing that happens after most court rulings — nothing, and plenty of it.

The trio of judges agreed that enforcing the order would be "exceedingly complex," another way of saying it can't be done.

Though he's the cad commiting this supposedly illegal deed, the consumer is safe from liability because there's no way to get to him.

THE COURT CAME down on Sony for selling the device the consumer uses, not on the consumer who uses it, which brings me back to the original point.

Disney could sue us all, I guess. But it won't. Bambi would roll over in his grave.

As Washington, D.C., communications lawyer Larry Secrest told a reporter, the individual damages are trivial. In a breathtaking burst of common sense, Secrest said, "Who's going to sue somebody for seven bucks?"

The court suggested that the best way to stuff these worms back into the can and slam the lid shut would be to put some kind of copyright royalty on recorders, meaning we'd have to pay more to buy one.

But that, they say, is a legislative problem because it has to do with copyright laws. It's one that Congress would have to act on, and the words Congress and act are almost mutually exclusive.

Nah, forget it, video guerrillas. As long as it's only the courts and Congress against us, the revolution is safe.

HUNTSVILLE, AL.
TIMES
D. 53,000 — S. 57,000
HUNTSVILLE METROPOLITAN AREA

OCT 28 1981

OMAHA, NEBRASKA
EVEN. WORLD-HERALD
D. 109,800
OMAHA METROPOLITAN AREA

Video Recorder Lawsuit Is Battle That Likely Will Cost Consumer

The writer is chairman of the broadcasting department in the University of Southern California School of Journalism. He was an award-winning documentary producer in TV.

By Joe Saltzman

Los Angeles Times Service.

Two basic if not legally honed rights are in conflict in the so-called Betamax case: the right to be properly compensated for work, and the right, in a free society, to have access to a variety of information.

The U.S. 9th Circuit Court of Appeals, in ruling that the taping of TV programs off the air — even for private use in the home — is an infringement of copyright laws, made it clear just what is at stake, and in doing so jammed on the brakes in the onrushing video revolution. At least for the moment; the ruling is now being appealed to the U.S. Supreme Court.

By now millions of people intimately or remotely connected with the video industry — whether by simply owning or selling a videotape recorder, or producing an instructional film on the rural dances of Guatemala, or directing a major motion picture — are beginning to realize the complexity and serious ramifications that the video future holds for all of us.

As with most complicated areas of human activity (free press vs. fair trial is one that comes to mind), there are no easy solutions. More than 3 million video cassette recorders — with an estimated 1.5 million more ready to be sold by next year — are being used day in and day out to record practically everything available in video-audio format, from motion pictures to sports events, from documentaries to pornography.

Many people argue that consumers should be allowed permanent access to whatever information-entertainment arrives in their homes by way of the television set. We already pay for this in one way or another (cable fees, pay TV, commercials). The problem is that, at present, the people who created the product receive no additional compensation when their work is recycled in this manner.

★

Few consumers see any problem in an individual taping a program for later viewing or even for permanent future reference. The courts have long ruled that what the individual does at home is his or her own business -- provided it doesn't harm anyone or result in unauthorized commercial gain.

More of a problem is presented in classroom use. Educators, faced with impossibly low budgets that include little money to buy video-audio products, eagerly have turned to the videotape recorder. The choice isn't between buying a product or taping it off a TV set; the choice is between not having the product or taping it off a TV set.

(An educators' exemption under the 1978 revision of the Copyright Act says that reproducing copyrighted material "for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research is not an infringement of copyright." It is unclear whether that provision will be affected by this case.)

It is difficult to have much sympathy for such rich companies as Universal Studios Inc. and Walt Disney Productions, which filed suit in Los Angeles against the Sony Corp. of America five years ago.

But what about the individual writer, the producer, the director, the technician, the one-man or woman operation working days-months-years to produce programs so easily copied?

The struggling artist may seem like a cliche but is all too real. The artist mortgages home and family to complete a program, then sells the distribution rights for a pittance, hoping that royalties will save the day. When the program appears on various over-the-air and cable stations, it can be taped by anyone. No royalties, no salvation.

Certainly anyone who creates a video-audio product should benefit from its use by others. No one denies that. But how?

It is one thing for courts to rule that manufacturers and retailers of recorders (and, by extension, of blank tape) should be held liable for having supplied the equipment and the raw stock. It is another to determine how to collect and distribute royalties among the companies, distributors, producers, directors, writers, technicians, actors and everyone else involved in a production.

A solution is needed that preserves the right of both individuals and schools to use these TV materials while still properly compensating the creators of those programs.

★

As a journalist who has been on both sides, I've fumed, while working in TV, knowing that my programs were being used without compensation, and I've fretted, but still used other people's products without compensation, while teaching in the classroom.

Deciding which creator gets what should be left to the industry and its unions, not the legal system or government.

The most equitable method of compensation might be to assess a fee for each blank video or audio tape sold. For consumers, it would mean higher prices for blank cassettes, but that makes more sense than adding a one-time-only fee to the purchase of a video recorder.

Also, a nominal per-student or per-cardholder fee could be levied annually against educational institutions and libraries. It would be small enough not to disable the school or college or library budget, but large enough in number of participants to make a significant contribution to the pot.

All this money could then be put into a fund from which companies and distributors of the products would collect a fair percentage based on the number of programs they hold that were shown on all forms of television the preceding year.

But what about that independent producer, the artist who mortgages all to finish a creative product and rarely reaps the rewards? That person has always been on the bottom of the pile, no matter what the system. The artist in any society usually ends up losing to business interests or government, and undoubtedly will do so in the future regardless of what is done to solve the video-recorder case in or outside the courts. That's the way it was in Shakespeare's time, and that's the way it is in Walter Cronkite's time. Unfortunately, this new wrinkle won't make any difference.

APPENDIX H

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FILED
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NOV 6 1981
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNIVERSAL CITY STUDIOS, INC., a corporation,

Plaintiff,

vs.

RCA CORPORATION, a corporation, MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., a corporation, MATSUSHITA ELECTRIC OF HAWAII, INC., a corporation, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, a corporation, ZENITH RADIO CORP., a corporation, VICTOR COMPANY OF JAPAN, LTD., a corporation, JVC INDUSTRIES, INC., a corporation, N.V. PHILLIPS GLOEILAMPENFABRIEKEN, a corporation, NORTH AMERICAN PHILLIPS CORPORATION, a corporation, MAGNAVOX CONSUMER ELECTRONICS, CO., a corporation, GENERAL ELECTRIC CO., a corporation, SEARS ROEBUCK AND CO., a corporation, SANYO MANUFACTURING CO., a corporation, SANYO ELECTRIC INC., a corporation, TOKYO SHIBAURA ELECTRIC CO., a corporation, TOSHIBA AMERICA, INC., a corporation, HITACHI, LTD., a corporation, HITACHI SALES CORPORATION OF AMERICA, a corporation, AKAI ELECTRIC COMPANY, LTD., a corporation, AKAI AMERICA, LTD., a corporation, SHARP CORPORATION, a corporation, SHARP ELECTRONICS CORPORATION, a corporation, GENERAL TELEPHONE & ELECTRONICS CORP., a corporation, CURTIS MATHES CORP., a

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COMPLAINT FOR COPYRIGHT INFRINGEMENT, UNFAIR COMPETITION AND DECLARATORY JUDGMENT corporation, MITSUBISHI CORP., a corporation, LEO BURNETT, CO., INC., a corporation, TED BATES & COMPANY, a corporation, NEEDHAM, HARPER & STEERS ADVERTISING, INC., a corporation, FOOTE, CONE & BELDING, INC., a corporation, WILLIAM ESTY CO., a corporation, BATTEN, BARTON, DURSTINE & OSBORNE, INC., a corporation, OGILVY & MATHER, INC., a corporation, MARSTELLER, INC., a corporation, NATHANSON ADVERTISING, a corporation, DKG INC., a corporation, McCANN-ERICKSON, a corporation, COCHRANE, CHASE AND LIVINGSTON, a corporation, ISADORE, LEFKOWITZ & ELGORT, a corporation, YOUNG & RUBICAM, a corporation, DOYLE DANE BERNBACH, INC., a corporation, and CHIATT-DAY, INC., a corporation, SANSUI ELECTRONICS CORPORATION, a corporation,

Defendants.

Plaintiff complains and alleges as follows:

JURISDICTION

1. This is an action for copyright infringement under the Copyright Act of the United States (including both the Copyright Act of 1909 and the Copyright Revision Act of 1976), Title 17, United States Code §§ 1 et seq. and §§ 101 et seq. ("the Copyright Act"), and for unfair competition and for declaratory judgment. Jurisdiction over Counts I through V is conferred by virtue of Title 28, U.S.C. § 1338(a). Jurisdiction over Count VI is conferred by virtue of Title 28, U.S.C. §§ 1338(a) and 2201. Jurisdiction over Count VII is conferred by virtue of Title 15, U.S.C §§ 1121, 1125(a) and Title 28, U.S.C. § 1338(a). Jurisdiction over Count VIII is conferred by virtue of Title 15, U.S.C §§ 1121, 1126 and Title 28, U.S.C. § 1338(a) and, in the alternative, by virtue of Title 28, U.S.C

§ 1338(b) and by the doctrine of pendent jurisdiction, such counts being claims arising out of substantially the same facts as Count I through V.

THE PARTIES

2. Plaintiff Universal City Studios, Inc. is now and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and qualified to do business in the State of California, with its principal place of business in Los Angeles County, California. At all times mentioned herein, Plaintiff has done business under its own name and under the fictitious names, among others, of Universal Television, Universal Pictures, Universal 16 and United World Films. Plaintiff is a wholly owned subsidiary of MCA Inc., a corporation.

3. Plaintiff is informed and believes and therefore alleges that each of defendants RCA Corporation ("RCA"), Matsushita Electric of Hawaii, Inc. (Matsushita Hawaii"), Matsushita Electric Corporation of America ("Matsushita America"), Zenith Radio Corporation ("Zenith"), JVC Industries, Inc. ("JVC"), North American Phillips Corporation ("American Phillips"), Magnavox Consumer Electronics Company ("Magnavox"), General Electric Corp. ("G.E."), Sears Roebuck & Co. ("Sears"), Sanyo Electric Inc. ("Sanyo America"), Toshiba America, Inc. ("Toshiba America"), Hitachi Sales Corporation of America ("Hitachi America"), Akai America, Ltd. ("Akai America"), Sharp Electronics Corporation ("Sharp America"), General Telephone & Electronics Corp. ("GTE"), Curtis-Mathes Corp. ("Curtis Mathes"), Sansui Electronics Corporation ("Sansui"), Leo Burnett Co., Inc.

("Burnett"), Ted Bates & Company ("Ted Bates"), Needham, Harper & Steers Advertising, Inc. ("Needham, Harper"), Foote, Cone & Belding, Inc. ("Foote, Cone"), William Esty Co. ("Esty"), Batten, Barton, Durstine & Osborne, Inc. ("BBDO"), Oglivy & Mather, Inc. ("Oglivy"), Marsteller, Inc. ("Marsteller"), Nathanson Advertising ("Nathanson"), DKG Inc. ("DKG"), McCann-Erickson, Cochrane, Chase & Livingston ("Cochrane, Chase"), Isadore, Lefkowitz & Elgort ("Isadore, Lefkowitz"), Young & Rubicam ("Y&R"), Doyle Dane Bernbach Inc. ("DDBI") and Chiatt-Day, Inc. ("Chiatt-Day") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of one of the States of the United States of America and qualified to do business and doing business in the State of California; and that the principal office of each such defendant in said state is located in Los Angeles County, California.

4. Plaintiff is informed and believes and therefore alleges that each of defendants Matsushita Electric Industrial Co., Ltd. ("Matsushita"), Victor Company of Japan, Ltd. ("Victor"), Sanyo Manufacturing Co. ("Sanyo"), Tokyo Shibaura Electric Co. ("Toshiba"), Hitachi, Ltd. ("Hitachi"), Akai Electric Company, Ltd. ("Akai"), Sharp Corporation ("Sharp") and Mitsubishi Corp. ("Mitsubishi") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the Country of Japan and is and at all times mentioned herein was transacting business in the State of California, County of Los Angeles.

5. Plaintiff is informed and believes and therefore alleges that defendant N.V. Phillips Gloeilampenfabrieken ("N.V.

Phillips") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the Country of Holland (The Netherlands) and is and at all times mentioned herein was transacting business in the State of California, County of Los Angeles.

6. Plaintiff is informed and believes and therefore alleges that each of the defendants listed in the right hand column of the following table is a subsidiary wholly owned by the corporation listed opposite its name in the lefthand column of the table:

PARENT	SUBSIDIARY
Matsushita Electric Industrial Co., Ltd.	Matsushita Electric of Hawaii, Inc.
Matsushita Electric Industrial Co., Ltd.	Matsushita Electric Corporation of America
Matsushita Electric Industrial Co., Ltd.	Victor Company of Japan, Ltd. (51% ownership only)
Victor Company of Japan, Ltd.	JVC Industries, Inc.
N.V. Phillips Gloeilampenfabrieken	North American Phillips Corporation
North American Phillips Corporation	Magnavox Consumer Electronics Co.

Sanyo Manufacturing Co.	Sanyo Electric, Inc.
Tokyo Shibaura Electric Co.	Toshiba America, Inc.
Hitachi, Ltd.	Hitachi Sales Corporation of America
Akai Electric Company, Ltd.	Akai America, Ltd.
Sharp Corporation	Sharp Electronics Corporation

7. Plaintiff is informed and believes and therefore alleges that Phyllis Segal, Ted Siminoski, Terry Blaylock, Mark Strelecki and Mr. and Mrs. Gary Grosporean are now and at all times mentioned herein were residents and citizens of the State of California, County of Los Angeles or County of San Bernadino.

8. NOTE: Ms. Segal and Messrs. Siminoski, Blaylock, Strelecki and the Grosporeans are not defendants in this action. Plaintiff does not seek relief herein against any homeowners who have purchased videotape recorders and videocassettes and used them only in their own homes to make off-the-air recordings of televised motion pictures for private non-commercial playback in their own homes. Plaintiff contends that such recordings constitute infringements of its copyrights in such motion pictures, but plaintiff seeks relief herein with respect to such recordings only against the manufacturers, distributors, sellers and advertisers of such videotape recorders and videocassettes.

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COUNT I

(By Plaintiff Against All Defendants
For Copyright Infringement)

9. Plaintiff hereby refers to paragraphs 1 through 8, inclusive, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

10. Plaintiff is now and at all times mentioned herein was the producer and owner of motion pictures for theatrical and television exhibition. All of such motion pictures are duly copyrighted under the Copyright Act; and such copyrights are owned by plaintiff. Plaintiff is also the owner and proprietor of several motion pictures, and the copyrights therein, which were produced and originally copyrighted by persons other than plaintiff.

11. Many of the copyrighted motion pictures produced and owned by plaintiff have been, are now and will in the future be exhibited on pay television and so-called free television, including television networks, local television stations and cable television.

12. Plaintiff is informed and believes and therefore alleges that RCA, Matsushita, Matsushita Hawaii, Matsushita America, Zenith, Victor, JVC, N.V. Phillips, American Phillips, Magnavox, G.E., Sears, Sanyo, Sanyo America, Toshiba, Toshiba America, Hitachi, Hitachi America, Akai, Akai America, Sharp, Sharp America, GTE, Curtis Mathes, Sansui and Mitsubishi (hereinafter "the manufacturer/distributor defendants") each manufacture and/or distribute videotape recorders (hereinafter "VTR's") which utilize cassettes containing videotape which is 1/2" wide

(or less) and which record in both color and black and white. Each of such videotape recorders is designed, manufactured and sold to owners of television sets in the United States who watch television shows (including motion pictures produced, copyrighted and owned by plaintiff) broadcast or transmitted on pay television, cable television, network television and local television stations in the United States.

13. Plaintiff is informed and believes and therefore alleges that each defendant named in the preceding paragraph has since in or about late 1977 manufactured and/or sold, and is presently manufacturing and/or selling, videotape cassettes (hereinafter "videocassettes") containing 1/2" wide (or less) videotape for use in the VTR's manufactured and/or sold by each said respective defendant.

14. Each VTR described hereinabove which is manufactured or sold by each of the defendants named in Paragraph 12 hereinabove is designed, manufactured, sold, distributed and/or advertised by each such defendant for the main and primary purpose of inducing, encouraging, causing, and allowing purchasers thereof to record on the videocassettes manufactured or sold for use in such VTR's copies and recordings of television shows broadcast or transmitted on pay television, cable television, television networks and local television stations, including motion pictures owned and copyrighted by plaintiff. Plaintiff is informed and believes and therefore alleges that at all times mentioned herein defendants knew, and continue to know, that such purchasers will use such VTR's and videocassettes for such purpose.

15. Plaintiff is informed and believes and therefore alleges that defendants, and each of them, have engaged in nationwide advertising campaigns, and in furtherance thereof, have produced and published and exhibited and broadcast to the public televised, sound recorded and printed advertisements and brochures throughout the United States, in interstate commerce, for the purpose of selling one or more brands of the VTR's and videocassettes described hereinabove to members of the public for use by members of the public in making recordings and copies of television shows off pay television transmissions, cable television transmissions, television network broadcasts and local television station broadcasts, including motion pictures owned and copyrighted by plaintiff. Plaintiff is informed and believes and therefore alleges that said defendants are continuing and intend to continue to engage in said advertising campaigns.

16. Plaintiff is informed and believes and therefore alleges that the following table sets forth the brand of each VTR sold in the United States as alleged hereinabove, the manufacturers and distributors thereof and the advertising agency which has been employed by each such manufacturer and distributor to advertise such brand:

BRAND	MANUFACTURER	DISTRIBUTOR	ADVERTISING AGENCY
RCA Selectavision	Matsushita	RCA	Burnett
Panasonic	Matsushita	Matsushita Hawaii and Matsushita America	Ted Bates

BRAND	MANUFACTURER	DISTRIBUTOR	ADVERTISING AGENCY
Quasar	Matsushita	Matsushita Hawaii and Matsushita America	Needham, Harper
Zenith	Zenith	The Sony Corporation	Foote, Cone
JVC	Victor	JVC	Martseller
Magnavox	N.V. Phillips	American Phillips and Magnavox	Esty
General Electric	Matsushita	G.E.	BBDO
Sears Betavision	Sanyo	Sears	Ogilvy
Sanyo Betacord	Sanyo	Sanyo America	Nathanson
Toshiba Betaformat	Toshiba	Toshiba America	DKG
Hitachi	Matsushita	Hitachi and Hitachi America	McCann-Erickson
Akai	Matsushita	Akai and Akai America	Cochrane Chase
Sharp	Sharp	Sharp America	Isadore, Lefkowitz
Curtis Mathes	Matsushita	Curtis-Mathes	Y & R
Philco & Sylvania	Matsushita	GTE	DDBI
MGA	Victor	Mitsubishi	Chiatt-Day
Sansui	Unknown	Sansui	Unknown

17. Defendants and the United States retail sales outlets of the manufacturer/distributor defendants have sold and offered for sale and are currently selling and offering for sale the aforesaid VTR's and videocassettes throughout the United States for the purpose of inducing, causing, encouraging, and allowing purchasers thereof to record and copy, and with the knowledge that such purchasers will record and copy, on such videocassettes television shows broadcast or transmitted on pay television, cable television, television networks and local television stations, including motion pictures owned and copyrighted by plaintiff.

18. Defendants and the United States retail sales outlets of the manufacturer/distributor defendants have sold and offered for sale and are currently selling and offering the aforesaid VTR's and videocassettes for sale throughout the United States for the additional purposes of inducing, causing, encouraging, and allowing purchasers thereof to -- and with knowledge that such purchasers will -- omit television commercials from the aforesaid recordings and copies, skip over recorded commercials by use of the fast forward and other controls on such VTR's, build and maintain libraries and collections of such recordings and copies, and trade, lend, swap, and duplicate recordings and copies of plaintiff's copyrighted motion pictures with other persons.

19. Defendants have failed to clearly, prominently and unequivocally advise the public that use of the foregoing VTR's and videocassettes as aforesaid, including, without limitation, the use thereof to record and copy copyrighted motion

pictures, including those owned by plaintiff, constitutes copyright infringement and violates the rights of copyright owners, including plaintiff, under the Copyright Act.

20. Plaintiff is informed and believes and therefore alleges that defendants have taken no steps whatever to attempt to prevent the recording of copyrighted motion pictures broadcast or transmitted on pay television, cable television, television networks and local television stations, including those owned by plaintiff, or to prevent the omission of commercials, the skipping over of recorded commercials, the building and maintaining of libraries and collections of plaintiff's copyrighted motion pictures and the trading, lending, swapping and duplicating of plaintiff's copyrighted motion pictures.

21. Plaintiff is informed and believes and therefore alleges that the purchasers of the foregoing VTR's and videocassettes have used them to record and copy, and have recorded and copied, several motion pictures owned and copyrighted by plaintiff. Said recordings and copies were made without the consent of plaintiff and constitute infringement upon plaintiff's said copyrights.

22. Plaintiff is further informed and believes and therefore alleges that said purchasers have in the past used and are currently using and will continue to use the aforesaid VTR's and videocassettes to omit commercials from such recordings, to skip over recorded commercials upon playback, to build and maintain libraries and collections of recordings of plaintiff's copyrighted motion pictures and to trade, lend, swap and duplicate

recordings and copies of plaintiff's copyrighted motion pictures, all without the consent of plaintiff.

23. Plaintiff does not presently know (a) the number of VTR's and videocassettes sold by each of the manufacturer/distributor defendants in the United States, (b) the identities of the purchasers of said VTR's and videocassettes or (c) the titles and copyright registration numbers of the motion pictures recorded and copied as aforesaid. However, plaintiff will seek leave to amend this paragraph to allege such information when it becomes known to plaintiff through discovery.

24. By engaging in the acts and conduct herein alleged, defendants, and each of them, have induced, caused, encouraged, solicited, aided, abetted, authorized and materially contributed to, the recording and copying -- and, hence, to the infringement -- of copyrighted motion pictures owned by plaintiff as aforesaid, and defendants, and each of them, are continuing to do so. All of said acts and conduct have occurred in or have affected, and are currently occurring in or affecting, interstate commerce.

25. The foregoing acts and conduct of defendants have been without the consent of plaintiff and constitute infringements of the aforesaid copyrights owned by plaintiff. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, plaintiff has been damaged.

26. Plaintiff is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiff is unaware of the exact amount of such

profits derived and received by defendants. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of plaintiff, and plaintiff is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

27. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to induce, encourage, solicit, aid, abet and authorize the infringement of plaintiff's copyrights as aforesaid.

28. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused, and are causing, and will continue to cause plaintiff great and irreparable injury, loss and damage which cannot be adequately compensated or measured in money and for which plaintiff has no adequate remedy at law.

29. Plaintiff is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of plaintiff, and plaintiff is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by this Court.

COUNT II

(By Plaintiff Against RCA, Matsushita and
Burnett for Copyright Infringement)

30. Plaintiff hereby refers to Paragraphs 1 through 20, inclusive, and paragraphs 24 through 29, inclusive, herein-

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above, and incorporates them, each and all, herein by this reference as though set forth in full.

31. Plaintiff is informed and believes and therefore alleges that within the last three (3) years, Phyllis Siegel and Ted Siminoski purchased a RCA Selectavision VTR and RCA videocassettes from retail television outlets and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion picture owned by plaintiff, or substantial portions thereof: THE OTHER SIDE OF THE MOUNTAIN: PART II.

32. Plaintiff has applied for and received a Certificate of Copyright Registration for said motion picture with the following registration number and registration date: Registration Number, PA 8-975; Registration Date, July 18, 1978.

33. Plaintiff has complied in all respects with the Copyright Act with respect to such motion picture and the copyright therein.

34. The foregoing conduct was without the consent of plaintiff and constituted infringement upon the copyright in said motion picture.

35. The foregoing RCA Selectavision VTR and videocassettes were manufactured for profit by Matsushita and/or RCA and were sold for profit by said defendants to said retail television outlets and advertised for profit by RCA and Burnett for the purpose of having said retail television outlets sell the RCA Selectivision VTR and videocassettes for profit to purchasers such as Ms. Siegel and Mr. Siminoski with the knowledge and intent that such purchasers would use the RCA Selectavision

VTR and videocassettes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiff. Neither Matsushita, RCA, Burnett nor said retail television outlets took any steps to police or control the contents of the recordings made by Ms. Siegel and Mr. Siminoski on said VTR, although it was within their power to do so.

36. By reason of the bulk of the aforesaid copyrighted motion picture, and the unauthorized videocassette recording thereof, it is impractical to attach copies of said motion picture and videocassette recording to this Complaint. However, a copy of said motion picture and said videocassette recording will be made available for review thereof as will suit the convenience of the Court. Plaintiff requests that the contents of such motion picture and unauthorized videocassette recording may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion picture and unauthorized videocassette recording had been capable of being, and had been, attached to the Complaint.

37. Plaintiff is informed and believes and therefore alleges that Ms. Siegel and Mr. Siminoski have used, and intend to continue to use, their RCA Selectavision VTR and videocassettes to record and copy, and have recorded and copied, several other motion pictures owned and copyrighted by plaintiff.

38. The foregoing acts and conduct of defendants and Ms. Siegel and Mr. Siminoski are and have been without the consent of plaintiff and constitute infringements of the aforesaid copyright owned by plaintiff. As a direct and proximate result

of the foregoing acts and conduct of defendants, plaintiff has been damaged.

39. Plaintiff is informed and believes and therefore alleges that defendants Matsushita, RCA and Burnett, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiff is unaware of the exact amount of such profits derived and received by said defendants and plaintiff will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiff, and plaintiff is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

40. The acts and conduct and threatened acts and conduct of defendants and Phyllis Siegel and Ted Siminoski as hereinabove alleged, have caused and are causing, and will continue to cause plaintiff great and irreparable injury, loss and damage which cannot be adequately compensated or measured in money and for which plaintiff has no adequate remedy at law.

COUNT III

(By Plaintiff Against Matsushita,
Matsushita Hawaii, Matsushita America and Ted Bates)

41. Plaintiff hereby refers to paragraphs 1 through 20, inclusive, and paragraphs 24 through 29, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

42. Plaintiff is informed and believes and therefore alleges that within the last three (3) years, Mr. and Mrs. Gary Grosporean purchased a Panasonic VTR and videocassettes from retail television outlets and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by plaintiff, or substantial portions thereof:

A. "Jesus Christ Superstar"
B. "American Grafitti"
C. "Duck Soup"
D. "Jaws"

43. Plaintiff has applied for and received Certificates of Registration of Claim to Copyright in each said motion picture with the following registration numbers and registration dates (and renewal registration numbers and registration dates, where applicable):

Title	Reg. No.	Reg. Date
"Jesus Christ Superstar"	LP 43776	10/07/74
"American Grafitti"	LP 43624	6/25/74
"Duck Soup"	LL 4246	1933
Renewal:	R 267241	11/25/60
"Jaws"	LP 44550	07/08/75

The original copyright certificate in "Duck Soup" was acquired by Paramount Productions, Inc. and the renewal certificate by EMKA, Ltd. Plaintiff has acquired by assignment, and is now and at all times mentioned herein has been the legal owner and proprietor of, the copyright and renewal copyright in "Duck Soup".

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44. Plaintiff and its predecessors have complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights and renewal copyrights therein.

45. The foregoing conduct was without the consent of plaintiff and constituted infringement upon the copyrights and renewal copyrights in said motion pictures.

46. The said Panasonic VTR and videocassette tapes were manufactured for profit by Matsushita and sold for profit by Matsushita, Matsushita Hawaii and Matsushita America to said retail television outlets and advertised by all of said defendants and Ted Bates for the purpose of having said retail television outlets sell the Panasonic VTR and videocassettes for profit to purchasers such as Mr. and Mrs. Grosporean with the knowledge and intent that said purchasers would use the Panasonic VTR and videocassettes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiff. Neither Matsushita, Matsushita Hawaii, Matsushita America, Ted Bates nor said retail television outlets took any steps to police or control the content of the recordings made by Mr. and Mrs. Grosporean on said Panasonic VTR, although it was within their power to do so.

47. By reason of the bulk of the aforesaid copyrighted motion pictures and unauthorized videotape recordings, it is impractical to attach copies thereof to this Complaint. However, copies of such motion pictures and videocassette recordings will be made available for review thereof as will suit the convenience of the Court. Plaintiff requests that the contents of such motion pictures and unauthorized videotape recordings may be

deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures and been capable of being, and had been, attached to the Complaint.

48. Plaintiff is informed and believes and therefore alleges that Mr. and Mrs. Grosporean have used, and intend to continue to use, their Panasonic VTR and videocassettes to record and copy, and have recorded and copied, several other motion pictures owned and copyrighted by plaintiff.

49. The foregoing acts and conduct of defendants and Mr. and Mrs. Grosporean have been without the consent of plaintiff and constitute infringements of the aforesaid copyrights owned by plaintiff. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiff has been damaged.

50. Plaintiff is informed and believes and therefore alleges that defendants Matsushita, Matsushita Hawaii and Matsushita America and Ted Bates, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiff is unaware of the exact amount of such profits derived and received by said defendants and plaintiff will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiff, and plaintiff is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

51. The acts and conduct and threatened acts and conduct of defendants and Mr. and Mrs. Grosporean as hereinabove

alleged, have caused and are causing, and will continue to cause plaintiff great and irreparable injury, loss and damage which cannot be adequately compensated or measured in money and for which plaintiff has no adequate remedy at law.

COUNT IV

(By Plaintiff Against Matsushita, Matsushita America, Matsushita Hawaii and Ted Bates)

52. Plaintiff hereby refers to paragraphs 1 through 20, inclusive, and paragraphs 24 through 29, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

53. Plaintiff is informed and believes and therefore alleges that within the last three (3) years Terry Blaylock purchased a Panasonic VTR and videocassettes from retail television outlets and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by plaintiff, or substantial portions thereof:

A. "High Plains Drifter"

B. "Somewhere In Time"

C. "Cheech & Chong's Next Movie"

54. Plaintiff has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein. Plaintiff has applied for and received Certificates of Registration of Claim to Copyright in each said motion picture with the following registration numbers and registration dates:

Title	Reg. No.	Reg. Date
"High Plains Drifter"	LP 43621	8/16/73
"Somewhere In Time"	PA 84-963	10/3/80
"Cheech & Chong's Next Movie"	PA 78-158	7/25/80

55. Plaintiff has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein.

56. The foregoing conduct was without the consent of plaintiff and constituted infringement upon the copyrights of said motion pictures.

57. The foregoing Panasonic VTR and videocassettes were manufactured for profit by Matsushita and were sold for profit by Matsushita, Matsushita Hawaii and Matsushita America to said retail television outlets and advertised for profit by all of said defendants and Ted Bates for the purpose of having said retail television outlets sell the Panasonic VTR and videocassettes for profit to purchasers such as Mr. Blaylock with the knowledge and intent that said purchasers would use the Panasonic VTR and videocassettes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiff. Neither Matsushita, Matsushita America, Matsushita Hawaii, Ted Bates nor said retail television outlets took any steps to police or control the contents of the recordings made by Mr. Blaylock on said VTR, although it was within their power to do so.

58. By reason of the bulk of the aforesaid copyrighted motion pictures, and the unauthorized videocassette recordings thereof, it is impractical to attach copies of said

motion pictures and said videocassette recordings to this Complaint. However, copies of said motion pictures and said videocassette recordings will be made available for review thereof as will suit the convenience of the Court. Plaintiff requests that the contents of such motion pictures and unauthorized videocassette recordings may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures and unauthorized videocassette recordings had been capable of being, and had been, attached to the Complaint.

59. Plaintiff is informed and believes and therefore alleges that Mr. Blaylock has used, and intends to continue to use, his Panasonic VTR and videocassettes to record and copy, and has recorded and copied, several other motion pictures owned and copyrighted by plaintiff.

60. The foregoing acts and conduct of defendants and Mr. Blaylock are and have been without the consent of plaintiff and constitute infringements of the aforesaid copyrights owned by plaintiff. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiff has been damaged.

61. Plaintiff is informed and believes and therefore alleges that defendants Matsushita, Matsushita America, Matsushita Hawaii and Ted Bates, and each of them, have derived and received sustantial profits from the foregoing wrongful acts and conduct. Plaintiff is unaware of the exact amount of such profits derived and received by said defendants and plaintiff will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of

plaintiff, and plaintiff is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

62. The acts and conduct and threatened acts and conduct of defendants and Terry Blaylock as hereinabove alleged, have caused and are causing, and will continue to cause plaintiff great and irreparable injury, loss and damage which cannot be adequately compensated or measured in money and for which plaintiff has no adequate remedy at law.

COUNT V

(By Plaintiff Against RCA, Matsushita and Burnett for Copyright Infringement)

63. Plaintiff hereby refers to Paragraphs 1 through 20, inclusive, and paragraphs 24 through 29, inclusive, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

64. Plaintiff is informed and believes and therefore alleges that within the last three (3) years, Mark Strelecki purchased a RCA Selectavision VTR and RCA videocassettes from retail television outlets and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by plaintiff, or substantial portions thereof: XANADU and several episodes of the television series entitled BATTLESTAR GALLACTICA.

65. Plaintiff has applied for and received a Certificate of Copyright Registration for each of said motion pictures. The registration number and registration date for XANADU are: Registration Number, PA 84-962; Registration Date, October 3,

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1980. Plaintiff is currently unaware of the specific episode titles of BATTLESTAR GALLACTICA recorded and copied by Mr. Strelecki and, accordingly, plaintiff is unable to set forth the registration numbers and registration dates for such episodes. When the titles of such episodes become known to plaintiff, plaintiff will seek leave to amend this paragraph to allege such registration numbers and registration dates.

66. Plaintiff has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein.

67. The foregoing conduct was without the consent of plaintiff and constituted infringement upon the copyrights in said motion pictures.

68. The foregoing RCA Selectavision VTR and videocassettes were manufactured for profit by Matsushita and/or RCA and were sold for profit by said defendants to said retail television outlets and advertised for profit by RCA and Burnett for the purpose of having said retail television outlets sell the RCA Selectivision VTR and videocassettes for profit to purchasers such as Mr. Strelecki with the knowledge and intent that such purchasers would use the RCA Selectavision VTR and videocassettes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiff. Neither Matsushita, RCA, Burnett nor said retail television outlets took any steps to police or control the contents of the recordings made by Mr. Strelecki on said VTR, although it was within their power to do so.

69. By reason of the bulk of the aforesaid copyrighted motion pictures, and the unauthorized videocassette recordings thereof, it is impractical to attach copies of said motion pictures and videocassette recordings to this Complaint. However, a copy of said motion pictures and said videocassette recordings will be made available for review thereof as will suit the convenience of the Court. Plaintiff requests that the contents of such motion pictures and unauthorized videocassette recordings may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures and unauthorized videocassette recordings had been capable of being, and had been, attached to the Complaint.

70. Plaintiff is informed and believes and therefore alleges that Mr. Strelecki has used, and intends to continue to use, his RCA Selectavision VTR and videocassettes to record and copy, and has recorded and copied, several other motion pictures owned and copyrighted by plaintiff.

71. The foregoing acts and conduct of defendants and Mr. Strelecki are and have been without the consent of plaintiff and constitute infringements of the aforesaid copyrights owned by plaintiff. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiff has been damaged.

72. Plaintiff is informed and believes and therefore alleges that defendants Matsushita, RCA and Burnett, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiff is unaware of the exact amount of such profits derived and received by said defendants and plaintiff will seek leave to amend this paragraph

when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiff, and plaintiff is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

73. The acts and conduct and threatened acts and conduct of defendants and Mark Strelecki as hereinabove alleged, have caused and are causing, and will continue to cause plaintiff great and irreparable injury, loss and damage which cannot be adequately compensated or measured in money and for which plaintiff has no adequate remedy at law.

COUNT VI

(By Plaintiff Against All
Defendants For Declaratory Judgment)

74. Plaintiff hereby refers to paragraphs 1 through 25, 31 through 38, 42 through 49, 53 through 60 and 64 through 71, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

75. Plaintiff is informed and believes and therefore alleges that the foregoing named purchasers and owners of VTR's and videocassettes manufactured, advertised and sold by defendants, and each of them, and all other purchasers and owners and future purchasers and owners of such VTR's and videocassettes in the United States, have used, are using, and intend to continue to use their VTR's and videocassettes to record and copy, and thereby infringe, television shows broadcast or transmitted on pay television, cable television, television networks and local

television stations, including motion pictures owned and copyrighted by plaintiff. Defendants, and each of them, know, intend and expect that the purchasers, owners and future purchasers and owners of such VTR's and videocassettes will use their VTR's and videocassettes for such purpose in the future.

76. By reason of the foregoing facts, an actual and justiciable controversy has arisen and now exists between plaintiff and defendants concerning the rights of defendants under the Copyright Act, now and in the future, to manufacture, advertise and sell VTR's and videocassettes for use in recording copyrighted motion pictures owned by plaintiff as aforesaid in that

(a) Plaintiff contends

(i) that the present and future use of such VTR's and videocassettes by all present and future owners thereof in the United States as alleged hereinabove is and will continue to be in violation of the Copyright Act and constitutes and will continue to constitute copyright infringement of plaintiff's copyrights; and,

(ii) that the present and future manufacture, distribution, advertising and sale by defendants and their advertisers and distributors and retail sales outlets of such VTR's and videocassettes throughout the United States to allow present and future purchasers thereof to make use thereof as alleged hereinabove (1) is and will continue to be in violation of the Copyright Act and constitutes and will continue to constitute copyright infringement of plaintiff's copyrights and (2) makes and will continue to make defendants and their advertisers, distributors and retail sales outlets of such VTR's and videocassettes civilly liable to plaintiff for such copyright infringements.

(b) Plaintiff is informed and believes and therefore alleges that defendants dispute and deny plaintiff's contentions.

77. By reason of the claims and contentions made and asserted by plaintiff and defendants, it is necessary that the rights, duties and obligations of plaintiff on the one hand and defendants on the other hand with respect to the manufacture, advertising, sale and use of such VTR's and videocassettes be determined by the Court.

COUNT VII

(By Plaintiff Against All Defendants
For Violation of 15 U.S.C. § 1125(a))

78. Plaintiff hereby refers to paragraphs 1 through 25, inclusive, and paragraphs 31 through 38, 42 through 49, 53 through 60 and 64 through 71, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

79. By engaging in the aforesaid acts and conduct, defendants, and each of them, have encouraged, induced, caused, solicited, aided, abetted and materially contributed to the

misappropriation of, and have misappropriated without the consent of plaintiff, valuable property and other rights of plaintiff.

80. By engaging in the aforesaid acts and conduct, defendants, and each of them, have misled the public and have caused public confusion, and are likely to continue to cause public confusion and to cause public mistake and to deceive and mislead and confuse the public into believing that the sale of such VTR's and videocassettes as aforesaid for the purpose of making copies of television shows, including motion pictures owned and copyrighted by plaintiff and others, is with the permission and consent of plaintiff and other owners of televised copyrighted motion pictures, and that the use of such VTR's and videocassettes to make copies of said motion pictures, including those owned and copyrighted by plaintiff, does not and will not violate the law or any rights of any persons, including plaintiff.

81. By the foregoing acts, defendants, and each of them, have used false designations of origin and false descriptions and representations in connection with the advertisement, sale and distribution of goods in interstate commerce in violation of 15 U.S.C. § 1125(a).

82. The foregoing acts and conduct of defendants have been without the consent of plaintiff. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, plaintiff has been damaged.

83. Plaintiff is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiff is unaware of the exact amount of such

profits derived and received by said defendants. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiff, and plaintiff is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

84. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove.

85. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and will continue to cause plaintiff great and irreparable injury, loss and damage which cannot be adequately compensated or measured in money and for which plaintiff has no adequate remedy at law.

COUNT VIII

(By Plaintiff Against All Defendants For Unfair Competition)

86. Plaintiff hereby refers to paragraphs 1 through 25, inclusive, and paragraphs 31 through 38, 42 through 49, 53 through 60, 64 through 71, 79, 80 and 82 through 85, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

87. The aforesaid acts and conduct of defendants, and each of them, constitute unfair and fraudulent business practices and unfair competition and a violation of the rights of plaintiff under federal law (15 U.S.C. § 1126) and the common law and

under California Civil Code § 3369 and California Business and Professions Code § 17500.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, jointly and severally, as follows:

1. That an injunction issue against defendants, and each of them, to protect plaintiff's copyrighted motion pictures from recording and copying on the aforesaid VTR's and videocassettes.

2. That defendants, and each of them, be adjudged to have infringed plaintiff's copyrights in its motion pictures "The Other Side Of The Mountain: Part II" "Jaws", "Jesus Christ Superstar", "American Grafitti", "Duck Soup", "High Plains Drifter", "Somewhere In Time", "Cheech & Chong's Next Movie" "Xanadu" and episodes of "Battlestar Gallactica", and such other motion pictures as plaintiff shall prove at trial to have been recorded and copied by purchasers of such VTR's and videocassettes.

3. That defendants, and each of them, be adjudged to have competed unfairly with plaintiff and engaged in unfair and fraudulent business practices in violation of 15 U.S.C. §§ 1121, 1125(a) and 1126 and the law of California;

4. For damages suffered by plaintiff according to proof adduced at trial;

5. For the profits received by defendants, and each of them, as a result of the acts and conduct of said defendants alleged in this Complaint, and for an accounting from defendants, and each of them, to determine said profits;

6. For a declaration in accord with plaintiff's contentions set forth in Count VI, above, including a declaration that the use of such VTR's and videocassettes to record and copy copyrighted motion pictures owned by plaintiff is a violation of the Copyright Act and constitutes copyright infringement, and that the manufacturers, advertisers, distributors and sellers of such VTR's and videocassettes are civilly liable for such infringements;

7. For costs of suit, including reasonable attorneys' fees, incurred herein; and

8. For all other relief to which Plaintiff is entitled pursuant to Federal Rules of Civil Procedure, Rule 54(c).

DATED: November 6, 1981

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN G. DAVIES
SONDRA E. BERCHIN

By Stephen A. Kroft
Stephen A. Kroft
Attorneys for Plaintiff

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNIVERSAL CITY STUDIOS, INC., a corporation, dba UNIVERSAL TELEVISION and UNIVERSAL PICTURES and WALT DISNEY PRODUCTIONS, a corporation,

Plaintiffs, Appellants and Cross-Appellees,

vs.

SONY CORPORATION OF AMERICA, a corporation, THE SONY CORPORATION, a corporation, CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation, DOYLE DANE BERNBACH, INC., a corporation, and WILLIAM GRIFFITHS,

Defendants, Appellees and Cross-Appellants,

NOS. 79-3683

79-3735

79-3762

(C.D. California Docket

No. CV 76 3520 F)

OPPOSITION TO MOTION FOR STAY OF MANDATE

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I

INTRODUCTION

Appellants Universal City Studios, Inc. and Walt Disney Productions oppose Appellees' Motion For Stay of Mandate Pending Application for Certiorari. A stay will substantially prejudice appellants by permitting the sale of hundreds of thousands (perhaps millions) of additional Betamax machines during the one to two years that this case remains under Supreme Court review. Not only will those sales result in the making of millions of additional unauthorized copies of appellants' copyrighted motion pictures, but a stay will render appellants powerless to obtain any protection against such unauthorized copying during the one to two year stay period.

II

ARGUMENT

When this action was filed on November 11, 1976, only approximately 23,000 Betamax had been sold. During the ensuing five years of litigation, Sony sold approximately 450,000 to 500,000 additional Betamax. In order to avoid the harmful effects of prospective sales of several million more Betamax, appellants moved this Court for an expedited hearing of the appellate argument in this case in September, 1980. Predictably, appellees opposed the motion so that they could pursue their strategy of selling as many Betamax as possible in order to hinder the Court's ability to fashion an effective remedy to protect appellants' copyrights. Appellees' opposition to the motion for expedited hearing was consistent with appellees' arguments on appeal that after millions of Betamax have been sold, it will be a practical impossibility to enforce a judgment in favor of appellants, and because of that alleged practical impossibility, this Court should not grant appellants any relief at all (e.g., Appellees' Brief, pp. 55(n. 37), 61).

Though appellees' strategy was successful in the District Court, it failed on appeal. On November 24, 1980, this Court (Browning, C.J. and Hug, J.) granted appellants' motion for expedited hearing, and on October 19, 1981, it reversed the District Court's judgment. Undaunted, appellees have continued to pursue their strategy by announcing that Sony will continue to sell Betamax as long as appellees can keep this case alive (Daily Variety, October 27, 1981, Exhibit "1" hereto) and by filing the instant motion to bar appellants from any relief pending the anticipated one to two years that this case will be subject to U.S. Supreme Court review.

Clearly, if appellees secure a stay of mandate pending U.S. Supreme Court review, they will sell hundreds of thousands (or millions) more Betamax during the stay period. Thereafter, when the case is returned to the District Court, they will certainly argue -- as they have previously -- that because of this vast additional number of Betamax, an effective remedy to protect plaintiffs' copyrights is no longer possible. Though the argument has no legal merit, it dramatically illustrates the prejudice which appellants will suffer from a stay: the longer issuance of the mandate is delayed, the more Betamax machines will be sold and the more unauthorized copies of appellants' motion pictures will be made. Indeed, putative "amicus" EIA (whose membership includes Sony) is doing its best to multiply the number of unauthorized

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copies by publishing pamphlets which boldly instruct VTR owners how to make duplicate copies of their off-the-air recordings (see Exhibit "2" hereto).[1] The longer such activities continue, the greater difficulty appellants will have in securing the effective remedy to which this Court has ruled they are entitled for the protection of their copyrights.

III

CONCLUSION

For all of the foregoing reasons, appellants submit that appellees' Motion for a Stay of Mandate Pending Application for Certiorari should be denied.

Respectfully submitted,

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN G. DAVIES
SONDRA E. BERCHIN

By Stephen A. Kroft
STEPHEN A. KROFT

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[1] These duplicating activities are far from theoretical. After the District Court's decision was issued, organized clubs for the nationwide trading of unauthorized off-the-air recordings have proliferated (see Declaration of Stephen A. Kroft (¶10, Exhs. 11-13), filed in this Court on September 15, 1980). Thus, if a stay is issued thousands, if not millions, of unauthorized recordings will no doubt circulate throughout the country during the stay period without compensation to appellants.

RADIO-TV MONITORING SERVICE, INC.
3408 WISCONSIN AVENUE, N.W. · WASHINGTON, D.C. 20016 · 244-1901

PROGRAM: ABC NIGHTLINE	DATE: MONDAY, NOVEMBER 16, 1981
STATION OR NETWORK: ABC TELEVISION NETWORK	TIME: 11:30 PM, EDT

THE HOME VIDEOTAPE CONTROVERSY

TED KOPPEL: Home videotape recorders, some 2.5 million Americans now own them. But, is it against the law to use them? A federal appeals court says it is to tape copyrighted television programs. But, the question of what to do is a complex and unresolved issue. We'll focus on that story tonight, as we talk live with the President of a major entertainment conglomerate which brought the suit, with a spokesman for the home videotape industry and with an expert on copyright law.

****

Good evening. Suing the Sony Corporation is one thing, after all, it makes many of those home videorecorders. And, perhaps, a case can be made for suing Henry's Camera Corporation. Apparently, it sells Sony videorecorders. As, for Doyle, Dane & Bernbach, it is Sony's advertising agency, here, in the United States. But, why sue poor, old William Griffiths? His crime, probably too strong a word, his only violation of the law is that he owns a Sony betamax. And, indeed, he was sued. Together with Doyle, Dane & Bernbach, Henry's Camera Corporation and mighty Sony itself, William Griffiths lost.

A federal appellate court in San Francisco ruled, recently, that the videotaping of a copyrighted television program, even when it is done at home for purely personal uses, violates the rights of those who own the program. Sidney Sheinberg is the President of the Music Corporation of America. MCA owns Universal Studios, one of the plantiffs in this case. Mr. Sheinberg, has it gone a little bit too far, do you think?

SIDNEY SHEINBERG (MCA PRESIDENT): Has what gone a little too far?

KOPPEL: This kind of a suit, where you sue a man for owning one of these and possibly using it in the privacy of his own home.

SHEINBERG: Well, quite frankly, we're not concerned with the man. We're concerned with the people who make the machine, the people who make the tapes. We want to be sure that our property isn't taken without being compensated.]

KOPPEL: All right, Mr. Wayman, is there something reasonable about that? Mr. Wayman, I should point out, is senior Vice-President at the Electronics Industry Association. Anything unreasonable about trying to protect what you own?

JACK WAYMAN (ELECTRONICS INDUSTRY ASSOCIATION): No, we believe that the copyright owners and the motion picture industry is well compensated, as it exists. We believe the court decision, by the appellate court, was erroneous. We hope that it will be reversed, reconsidered and if not we think that Congress will step in on behalf of the American public, and amend the copyright laws to keep up with our modern technology, such as a VCR represents.

KOPPEL: All right, we will talk in greater detail with Mr. Sheinberg and Mr. Wayman later in this broadcast. But, first, let's focus on what this controversy is all about. Here's Robin Groth.

(FILM SHOWN)

ROBIN GROTH: It's a simple process, just turn the power on, set the time, put in a tape cassette, push a couple of buttons and you're taping a movie, off television, in the privacy of your own home. There's only one thing wrong here, it's illegal.

STEPHEN KROFT (UNIVERSAL-DISNEY ATTORNEY): It's always been our position that the copying in the home or outside the home is the same. Copying is copying and it's illegal.

GROTH: Stephen Kroft is the attorney representing Universal Studios and Disney Productions. They are bringing legal action against the Sony Corporation of America and the betamax.

KROFT: It's really important, I think, to focus on the fact that we're not talking about one man, or two people with betamax. We're talking about hundreds of thousands of these machines.

GROTH: Bill Baker, a Vice-President of Sony, doesn't believe the studios have a case.

BILL BAKER (SONY CORPORATION): Well, obviously Sony Corporation of America strongly disagrees with the decision of the Circuit Court of Appeals. A number of legislators, both on the House

CONSUMER ELECTRONICS DAILY
October 27, 1981

RIAA Rejoices Over Sony Decision; Mentions Audio

Recording Industry Assoc. of America issues statement hailing federal court's video copyright ruling. And report doesn't neglect to hint decision might have effect on audio industry as well. RIAA pres. Stanley Gortikov reports, "I have not yet read the decision, only published newspaper commentaries. The decision supports our conviction that copyrighted audio/video productions . . . deserve protection." Statement adds rights of copyright holders "are imperilled by advancing technology." Echoing opinion of RIAA is John Fleming, law prof. at UC Berkeley who tells CEDaily: "There is obviously an audio corollary to the Court of Appeal's ruling. If taping copyrighted material off TV for home use is copyright infringement, then audio taping a record for home use is infringement, too. If the one is illegal then so is the other."

A ruling that threatens video recorder sales

BUSINESS WEEK
November 2, 1981

An unexpected decision handed down on Oct. 19 seems to threaten the booming billion-dollar video recorder business. The U. S. Court of Appeals in San Francisco ruled that the manufacturing of videotape recording equipment is illegal because it contributes to the infringement of copyrights held by movie and television programmers. However, the court hinted strongly that future manufacture and sale will not be enjoined.

The ruling came in a case brought in 1976 by Universal City Studios Inc. and Walt Disney Productions against Sony Corp. of America, manufacturer of the Betamax video recorder. The plaintiffs charged that when purchasers of video recorders tape programs broadcast on television they are infringing on the owners' copyrights. Sony, they insisted, contributed to this violation of the federal Copyright Act because the Betamax is sold "for the primary purpose of reproducing television programming." In 1976 a federal district court in Los Angeles dismissed the plaintiffs' claims after a five-week nonjury trial.

In largely reversing and returning the case to the lower court on Oct. 19, the unanimous three-judge appellate panel declared that the Copyright Act distinguishes between phono recording and video recording and that there is no "fair use" exemption for recording telecasts. "The copyright laws would seem to require that the copyright owner be given the opportunity to exploit" the market for home viewing, wrote Judge John F. Kilkenny in the court's opinion. Moreover, because the Betamax is not "suitable for substantial noninfringing use," Sony—along with its advertising agency, Doyle Dane Bernbach International Inc.—is liable for the infringement.

Complex relief. Declaring that the manufacture of video recorders is unlawful jeopardizes a business whose sales have risen from 100,000 units in 1977 to a current annual rate of 1.6 million. September, 1981, sales reportedly are up 64% from September, 1980. In addition to Sony's Betamax, which is sold by Sears Roebuck and Zenith, as well as Sony, Matsushita makes a VTR—called VHS—sold by RCA and General Electric.

Significantly, the court did not mandate an injunction against further manufacture of video recorders. Instead, it noted that "the relief question is exceedingly complex" and suggested that on remand the district court could consider imposing a compulsory license, coupled with royalty payments.

Universal's and Disney's attorney, Stephen A. Kroft, a partner in the Beverly Hills law firm of Rosenfeld, Meyer & Susman, said that the plaintiffs "will definitely ask for an injunction" and that "stopping the machines entirely is within the realm of possibility." He refused to speculate on the form in which a possible royalty could be paid if the court refuses an injunction.

Sony said it plans to appeal to the U. S. Supreme Court, which has discretion to refuse to review the case. The "ruling is just one step in what has been a long legal case and which will no doubt continue for several years," the company said. In the meantime, the appellate ruling does not prevent Sony from continuing to sell the Betamax. ■

COPYRIGHT INFRINGEMENTS

(Audio and Video Recorders)

WEDNESDAY, APRIL 21, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee convened, pursuant to notice, at 9:29 a.m., in room 2228, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. (acting chairman of the committee) presiding.

Also present: Senators DeConcini, Dole, Specter, Denton, Baucus, Metzenbaum, and Leahy.

Staff present: Eric Hultman, general counsel.

Subcommittee on Criminal Law staff present: Ralph Oman, staff director; Linda Colancecco, Charles Borden, and Peggy Williams, professional staff members; Grace Rienhoff, chief clerk; and Hamilton Peterson, staff assistant.

OPENING STATEMENT OF SENATOR MATHIAS

Senator MATHIAS. The committee will come to order. We are meeting today to consider the home taping copyright issue. What the committee wants to do is to strike a fair balance between the creative artists who make movies, television programs, and records; the home viewers and listeners who record these copyrighted works; and the manufacturers and retailers of newly developed taping equipment.

The committee held a hearing last year on the bill that was introduced by Senator DeConcini to exempt home video taping from copyright liability. I think there is a general agreement about that. I think we ought to move as quickly as possible to make it clear that the Government does not intend to hinder anybody's ability to tape, at home or elsewhere, for private and personal use. We have all seen those cartoons that have appeared in the newspaper with sinister figures looking in at the windows, waiting to break in at the very first indication that somebody has activated a recording device.

But, while protecting the public, I have a very strong sense that we also need to protect the rights of the creative artists—the writers, musicians, and film-makers, those who, after all, create the desire, who make it desirable, to do this home recording. So, preserving the copyright system's incentives to these artists to continue to produce artistic works of the very highest quality is clearly in the interest of the public. We might, I suppose, call them the taping public.

I recall that it was Dr. Samuel Johnson who observed two centuries ago that, "No man but a blockhead ever wrote except for money."

My amendment to S. 1758 would protect all sides by exempting home taping for private purposes from copyright infringement while creating a compulsory license for copyrighted audio and video works, with the manufacturers paying a small royalty payment. The amount of the royalty would be set by the Copyright Royalty Tribunal. I believe this amendment is true to the Constitution, which provides, in article I, section 8, that:

> Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

We are fortunate to have with us today a long list of eminent witnesses. I have asked them to limit their remarks here to 5 minutes to save some time for discussion. Written statements will be included in full in the hearing record, which will be kept open for 3 weeks for submissions by interested parties who were not able to be scheduled this morning.

Our second witness today is Miss Beverly Sills, the general manager of the New York City Opera. I know that Miss Sills could tell us that Puccini's heroine, Tosca, could live for art, but I think she would also agree that the modern artist needs something more to make ends meet. And I think we all know, as has been said, that, "A kiss may be grand, but it won't pay the rental on your humble flat, or help you at the automat."

So we are here today to see if we can figure out a way to give our creative people more than just a grateful kiss as a response for their contributions to our society.

Before we begin with the first witness I wish to place a copy of my amendment No. 1333.

[Amendment to S. 1758 follows:]

AMENDMENT NO. 1333

Purpose: ....

....

IN THE SENATE OF THE UNITED STATES—97th Cong., 2d Sess.

S. 1758

To amend title 17 of the United States Code to exempt the private noncommercial recording of copyrighted works on video recorders from copyright infringement.

March 4 (legislative day, February 22), 1982

Referred to the Committee on the Judiciary and ordered to be printed

AMENDMENTS intended to be proposed by Mr. MATHIAS (for himself, Mr. BAKER, Mr. ROBERT C. BYRD, Mr. CRANSTON, Mr. STEVENS, Mr. BAUCUS, and Mr. HART)

Viz: Strike all after the enacting clause and insert in lieu thereof:

That Congress hereby finds and declares that—

(a) "to promote the Progress of Science and useful Arts," the Constitution of the United States empowers the Congress to give authors and inventors for a limited time "the exclusive Right to their respective Writings and Discoveries";

(b) the copyright system has helped make the United States a dynamic force in art and culture;

(c) this system benefits both the creators of intellectual property and the consuming public—the creators by providing fair compensation and thereby the incentive to create new works, and the consumer by assuring a rich and ever-increasing variety of works from which to choose;

(d) copyright owners should receive fair compensation for their creative endeavors and the use of their property;

(e) home recording devices and media are designed, used and promoted to the public for the purpose of reproducing copyrighted material;

(f) the reproduction of copyrighted musical works, sound recordings and motion pictures and other audiovisual works by means of home recording devices and media infringes on the exclusive rights granted to copyright owners under section 106(1) of title 17, United States Code;

(g) nonetheless, individuals who make audio and video recordings in the home for private use should be relieved of any and all liability for such infringement;

(h) to ensure that the public continues to enjoy uninterrupted access to this copyrighted material, a compulsory license will be established for importers and manufacturers of recording devices and media who commercially benefit from such infringement; and

(i) the Copyright Royalty Tribunal shall determine fair compensation to the copyright owners: *Provided, however,* That no system of compensation will impose a direct liability on the individual who uses recording devices and media in the home for private purposes.

SEC. 1. Chapter 1 of title 17 of the United States Code is amended by inserting at the end thereof the following new section:

"§ 119. Limitation on liability: Video recording

"(a) HOME VIDEO RECORDING.—Notwithstanding the provisions of section 106(1), an individual who makes a single video recording of a motion picture or other audiovisual work in his or her private home is exempt from any liability for infringement of copyright if the video recording is for the private use of that individual or members of his or her immediate household.

"(b) COMPULSORY LICENSE FOR VIDEO RECORDING DEVICES AND MEDIA.—

"(1) Notwithstanding the provisions of section 106(1), the importation into and distribution in the United States, and the manufacture and distribution in the United States, of any video recording device or video recording medium shall be subject of compulsory licensing if the importer or manufacturer of the device or medium records the notice, and deposits the statement of account and royalties, specified by this clause.

"(A) The importer or manufacturer shall, at least one month before the distribution in the United States of any video recording device or any video recording medium or within sixty days after the effective date of this Act, whichever is later, record with the Register of Copyrights (hereinafter 'the Register') a notice including a statement of its identity and address and a description of any trade or business names, trademarks, or like indicia that it uses in connection with the importation, manufacture or distribution of video recording devices and video recording media in the United States, and thereafter, from time to time, such further information as the Register, after consultation with the Copyright Royalty Tribunal (hereinafter 'the Tribunal'), shall prescribe by regulation to carry out the purpose of this clause.

"(B) The importer or manufacturer shall deposit with the Register, at such times, for such periods, and in accordance with such requirements that the Register shall, after consultation with the

Tribunal, prescribe by regulation, a statement of account, covering the pertinent period next preceding, specifying the number of video recording devices and amount of video recording media imported into or manufactured in the United States during such period, and the number and amount distributed in the United States during such period, together with such other information, and in such form, content and manner, as the Register shall, after consultation with the Tribunal, from time to time prescribe by regulation. In the case of all statements of account deposited after the Tribunal has rendered a final decision in its first proceeding described in subsection (c) of this section, the statement shall be accompanied by a total royalty fee for the period covered by the statement, computed in accordance with determinations made by the Tribunal in proceedings conducted under subsection (c) of this section and chapter 8 of this title.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the importation into and distribution in the United States, or the manufacture and distribution in the United States, of any video recording device or video recording medium is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, 509, and 511, if the notice, statement of account, or royalty specified by clause (1) of this subsection has not been recorded or deposited and such failure was willful or repeated, or if the statement of account or royalty does not materially comply with the requirements of clause (1) or any regulations prescribed thereunder.

"(3) The Register shall receive all fees deposited under this section and, after deducting reasonable administrative costs, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Tribunal as provided by this title. The Register shall promptly submit to the Tribunal a compilation of all statements of account covering the pertinent periods provided by clause (1) of this subsection.

"(4) The royalty fees thus deposited in connection with video recording devices and media shall, in accordance with the procedures provided by clause (5), be distributed to the owners of copyright in motion pictures and other audiovisual works that were included in television transmissions made by a broadcast station, cable system, multipoint distribution service, subscription television service, or like means of transmission that were intended for reception by the public at large or particular members of the public during the period to which such fees pertain.

"(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

"(A) During such month that the Tribunal shall establish in each year following the year in which this Act takes effect, every person claiming to be entitled to compulsory license fees under clause (4) shall file a claim with the Tribunal for fees covered by all statements of account for periods during the preceding year in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(B) After the first day of the month following that established for the filing of claims under clause (5)(A) of this subsection, in each year following the year in which this Act takes effect, the Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

"(C) During the pendency of any proceeding under this subsection, the Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(c) DETERMINATION OF ROYALTY FEES.—

"(1) Not later than thirty days after the effective date of this Act, the Chairman of the Tribunal shall cause notice to be published in the Federal Register of the initiation of proceedings for the purpose of determining appropriate and reasonable royalty fees to be paid by manufacturers and importers for the distribution of video recording devices and video recording media in the United States. Such proceedings shall be initiated and concluded in accordance with section 804(e) of this title.

"(2) Such fees shall be calculated to afford to copyright owners of motion pictures and other audiovisual works a fair compensation for the use of their creative works.

"(3) The Tribunal may provide that the importer or manufacturer may deduct an amount that reflects a reasonable estimate of the amount of video recording media distributed by it in the United States during the period covered by a statement of account that is used principally for purposes other than making video recordings by individuals in private homes: *Provided*, That in such event the Tribunal shall prescribe by regulation standards and conditions under which such estimates may be made and limitations on such estimates.

"(4) The initial procedure specified in clause (1) of this subsection may, subject to clauses (2) and (3), be repeated in 1985 and at five-year intervals thereafter, in accordance with the petition procedure described in section 804(a)(2) of this title and regulations that the

Tribunal shall prescribe. Notwithstanding the provisions of section 809 of this title, any final determination by the Tribunal in the first and any subsequent proceeding under this subsection shall become effective thirty days following its publication in the Federal Register.

"(d) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

"A 'video recording' is a copy of a motion picture or other audiovisual work that has been reproduced directly from a television transmission by a broadcast station, cable system, multipoint distribution service, subscription television service, or like means of transmission that is intended for reception by the public at large or particular members of the public.

"A 'video recording device' is any machine or device of a kind designed, used or promoted for the primary purpose of making video recordings by individuals in private homes.

"A 'video recording medium' is any material object, now known or later developed, in which a motion picture or other audiovisual work can be fixed by use of a video recording device.".

SEC. 3. Chapter 1 of title 17 of the United States Code is amended by inserting at the end thereof the following new section:

"§ 120. Limitation on liability: Audio recording

"(a) HOME AUDIO RECORDING.—Notwithstanding the provisions of section 106(1), an individual who makes a single audio recording of a musical work or sound recording in his or her private home is exempt from any liability for infringement of copyright if the recording is for the private use of that individual or members of his or her immediate household.

"(b) COMPULSORY LICENSE FOR AUDIO RECORDING DEVICES AND MEDIA.—

"(1) Notwithstanding the provisions of section 106(1), the importation into and distribution in the United States, and the manufacture and distribution in the United States, of any audio recording device or audio recording medium shall be subject of compulsory licensing if the importer or manufacturer of the device or medium records the notice, and deposits the statement of account and royalties, specified by this clause.

"(A) The importer or manufacturer shall, at least one month before the distribution in the United States of any audio recording device or any audio recording medium or within sixty days after the effective date of this Act, whichever is later, record with the Register of Copyrights (hereinafter 'the Register') a notice including a statement of its identity and address and a description of any trade or business names, trademarks, or like indicia that it uses in connection with the importation, manufacture or distribution of audio recording devices and audio recording media in the United States, and thereafter, from time to time, such further information as the Register, after consultation with the Copyright Royalty Tribunal (hereinafter 'the Tribunal'), shall prescribe by regulation to carry out the purpose of this clause.

"(B) The importer or manufacturer shall deposit with the Register, at such times, for such periods, and in accordance with such requirements that the Register shall, after consultation with the Tribunal, prescribe by regulation, a statement of account, covering the pertinent period next preceding, specifying the number of audio recording devices and amount of audio recording media imported into or manufactured in the United States during such period, and the number and amount distributed in the United States during such period, together with such other information, and in such form, content and manner, as the Register shall, after consultation with the Tribunal, from time to time prescribe by regulation. In the case of all statements of account deposited after the Tribunal has rendered a final decision in its first proceeding described in subsection (c) of this section, the statement shall be accompanied by a total royalty fee for the period covered by the statement, computed in accordance with determinations made by the Tribunal in proceedings conducted under subsection (c) of this section and chapter 8 of this title.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the importation into and distribution in the United States, or the manufacture and distribution in the United States, of any audio recording device or audio recording medium is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, 509, and 511, if the notice, statement of account, or royalty specified by clause (1) of this subsection has not been recorded or deposited and such failure was willful or repeated, or if the statement of account or royalty does not materially comply with the requirements of clause (1) or any regulations prescribed thereunder.

"(3) The Register shall receive all fees deposited under this section and, after deducting reasonable administrative costs, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Tribunal as provided by this title. The Register shall promptly submit to the Tribunal a compilation of all statements of account covering the pertinent periods provided by clause (1) of this subsection. The Register and the Secretary of the Treasury shall maintain separate and distinct accounts and records for fees deposited in connection with (A) audio recording devices and media, pursuant to this section, and (B) video recording devices and media, pursuant to section 119, and the securities and interest pertaining respectively thereto.

"(4) The royalty fees thus deposited in connection with audio recording devices and media shall, in accordance with the procedures provided by clause (5), be distributed to the owners of copyright in musical works and sound recordings that were included in radio or television transmissions, or sold to the public in the form of phonorecords, during the period to which such fees pertain.

"(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

"(A) During such month that the Tribunal shall establish in each year following the year in which this Act takes effect, every person claiming to be entitled to compulsory license fees under clause (4) shall file a claim with the Tribunal for fees covered by all statements of account for periods during the preceding year in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(B) After the first day of the month following that established for the filing of claims under clause (5)(A) of this subsection, in each year following the year in which this Act takes effect, the

Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

"(C) During the pendency of any proceeding under this subsection, the Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(c) DETERMINATION OF ROYALTY FEES.—

"(1) Not later than thirty days after the effective date of this Act, the Chairman of the Tribunal shall cause notice to be published in the Federal Register of the initiation of proceedings for the purpose of determining appropriate and reasonable royalty fees to be paid by manufacturers and importers for the distribution of audio recording devices and audio recording media in the United States. Such proceedings shall be initiated and concluded in accordance with section 804(e) of this title.

"(2) Such fees shall be calculated to afford to copyright owners of musical works, sound recordings, a fair compensation for audio recordings of their works in private homes.

"(3) In determining such fees the Tribunal may take into account reasonable estimates of the amount of audio recording devices and media used in the United States during a relevant period for purposes other than making audio recordings by individuals in private homes: *Provided,* That such purposes are lawful under this title.

"(4) The initial procedure specified in clause (1) of this subsection may, subject to clauses (2) and (3), be repeated in 1985 and at five-year intervals thereafter, in accordance with the petition procedure described in section 804(a)(2) of this title and regulations that the Tribunal shall prescribe. Notwithstanding the provisions of section 809 of this title, any final determination by the Tribunal in the first and any subsequent proceeding under this subsection shall become effective thirty days following its publication in the Federal Register.

"(d) Definitions.—As used in this section, the following terms and their variant forms mean the following:

"An 'audio recording' is a phonorecord or aurally perceptible copy (without accompanying visual images) of a musical work or sound recording that has been reproduced directly from a radio or television transmission or from a phonorecord that has been lawfully made and distributed to the public.

"An 'audio recording device' is any machine or device of a kind designed, used, or promoted for making audio recordings by individuals in private homes.

"An 'audio recording medium' is any material object, now known or later developed, in any form commonly distributed for use in private homes (such as tape cassettes, cartridges, or reels), in which a musical work or sound recording can be fixed by use of an audio recording device. An audio recording medium does not include a material object that embodies a sound recording at the time it is first distributed by the importer or manufacturer, unless the sound recording has been so embodied in order to avoid the obligations of subsection (b) of this section.

"A 'radio transmission' and a 'television transmission' are transmissions by a broadcast station, cable system, multipoint distribution service, subscription service, direct broadcast satellite, or other means of transmission that are intended for reception in private homes.

SEC. 3. That chapter 5 of title 17 of the United States Code is amended by inserting at the end thereof the following new section:

"§511. Additional remedy for infringing importation or manufacture, and distribution, of audio and video recording devices and media

"In any action filed pursuant to section 119(b)(2) or 120(e)(2), the court may decree that, in addition to any other remedies provided by this title, for a period not to exceed ninety days the importer or manufacturer shall be deprived of the benefit of a compulsory license under section 119(b)(1) or 120(b)(1). In the absence of such license by reason of such decree, any importation into and distribution in the United States, or any manufacture and distribution in the United States, of audio or video recording devices or media by such party is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, 509, and this section.".

SEC. 4. That chapter 3 of title 17 of the United States Code is amended as follows:

(a) Section 801(b)(1) is amended by replacing the period after "118" with a comma, and adding the phrase "and to make determinations as to reasonable royalty fees as provided in sections 119 and 120," following the reference to "section 118".

(b) Section 801(b)(3) is amended by deleting the phrase "and 116," and substituting in lieu thereof the phrase "116, 119, and 120."

(c) Section 804(c) is amended by adding the phrase "and reasonable royalty fees as provided in sections 119 and 120," following the reference to "section 118" and by changing "that section" to "those sections.".

(d) Section 804(d) is amended by deleting the phrase "or 116," and substituting in lieu thereof "116, 119, or 120.".

(e) The second sentence of section 809 is amended by deleting the phrase "or 116" and substituting in lieu thereof the phrase "116, 119, or 120.".

SEC. 5. That section 109(a) of chapter 1 of title 17 of the United States Code is amended by replacing the period at the end thereof with a colon and inserting thereafter the following: "*Provided, however,* That the owner of a particular phonorecord of a sound recording, or a particular copy of a motion picture or other audiovisual work lawfully made under this title may not, unless authorized by the copyright owner, dispose of the possession of that phonorecord or copy by rental, lease, or lending, for purposes of direct or indirect commercial advantage.".

SEC. 6. SUPPLEMENTARY AND TRANSITIONAL PROVISIONS.—

(a) This Act becomes effective on its enactment.

(b) Section 501(a) of title 17 is amended by deleting "118" and substituting in lieu thereof "120."

(c) The table of sections for chapter 1 of title 17 of the United States Code is amended by inserting after the item relating to section 118 the following:

"119. Limitation on liability: Video recording.
"120. Limitations on liability: Audio recording.".

(d) The table of sections for chapter 5 of title 17 of the United States Code is amended by inserting after the item relating to section 510, the following:

"511. Additional remedy for infringing importation or manufacture, and distribution, of audio and video recording devices and media.".

Amend the title so as to read: "A bill to amend title 17 of the United States Code with respect to home recording and audio and video recording devices and media and for other purposes.".

Senator MATHIAS. The opening witness will be Mr. David Ladd, the Register of Copyrights, who is accompanied by several of his assistants from the Copyright Office, whom I will ask him to introduce for the record.

Mr. Ladd?

STATEMENT OF HON. DAVID LADD, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL AND ASSOCIATE REGISTER OF COPYRIGHTS; HARRIET OLER, KENT DUNLAP, AND MARILYN KRETSINGER

Mr. LADD. In a moment, Mr. Chairman. First of all, I would like to say how delighted I am to share with Miss Sills the audience which the Copyright Office has drawn here today. [Laughter.]

Senator MATHIAS. We will do this for you any time you come.

Mr. LADD. Thank you, Mr. Chairman.

It is, of course, an honor to be invited before the committee to give the Copyright Office views on the legislative issues before you. It is a comparable honor to be invited to appear here in the company of Miss Sills. I have been an opera buff for many years; I have heard Miss Sills many times, and never in my wildest dreams did I ever hope to share the stage with America's prima donna.

Let me take this occasion, though, to express to you, Miss Sills, my admiration for the plans that you explained at the Smithsonian lecture a few weeks ago to create a truly national American opera company, which is already focused on American singers and is increasingly focusing on American composers. When I met Miss Sills on that occasion, I did ask her if she would revive at the New York City Opera Virgil Thompson's "The Mother of Us All." She said she would be delighted, upon my payment of $250,000. And, Miss Sills, I have not yet been able to come up with the money.

Finally, before I turn to my statement, let me say that on this day of my entry into show biz, I am very glad that my act does not follow Miss Sills.

Now let me introduce my colleagues from the Copyright Office. Dorothy Schrader is general counsel and Associate Register of Copyrights; Harriet Oler, Kent Dunlap, and Marilyn Kretsinger, who are all attorney advisers.

Let me open my statement by offering to the committee and to the Congress my congratulations. As I say in the prepared statement, the *Betamax* decision, which is what brings us here today, did break like a thunderclap over the copyright and entertainment worlds. There was, as you suggest, Mr. Chairman, a considerable amount of sensational and, I believe, distorting publicity about that opinion; but now, at the remove of several months, the Congress is in a position calmly to assess the issues which were raised in that litigation and are raised by the current problems in the industries we are concerned with. I have submitted a rather long statement; and since, as you have directed, it will be entered in the record, I hope to boil this statement down to some essentials—really, to six points. And I hope in going through those six points as briefly as possible, to identify some rather wide swaths of controversy and debate which probably can be eliminated from these hearings.

The first point is that while the issue that we are dealing with here is independently of enormous importance, it is not an isolated issue. It is a particular expression of the continuing problem of adapting copyright to changing technologies. The Congress has already encountered this in trying to adapt the law to the photocopying issue, for example, and if I give you one example, I will show you that this is not atypical—that is to say, the issue before us is not atypical.

Satellite transmission is fairly recent, but already, home-Earth stations are dropping so rapidly in price that the unauthorized interception of those signals is becoming a problem for program producers and suppliers. There, as here, as in photocopying, there is a continuing and accelerating problem of adapting copyright to the technology.

What those instances have in common is the difficulty of finding, discerning, and measuring mass use of copyrighted materials.

The second point that I want to make is there is a basic issue, as you suggested, Mr. Chairman, in your opening statement, that everybody agrees upon. No one is trying to stop home taping. As a matter of fact, I doubt that anybody ever had that in mind at any time. No one is trying to invade the privacy of the home. No bill before the Congress would forbid home taping. Every bill before this committee now expressly allows it.

The DeConcini bill does provide broad exemptions for home taping. Your amendments do, too, but in addition, they provide compensation for the program properties which are used. In video, the authorization for that home taping is for personal use; in audio, the authorization is even broader, because it allows medium-to-medium taping as, for example, taping from authorized copies of discs to tapes.

The mechanism which is proposed in your amendments is a compulsory license, and it follows a model which we already have in the copyright law of the cable television compulsory license. That is to say, there is a royalty imposed upon the tape and hardware, but then, in common with the cable compulsory license, the rates are to be set by the Copyright Royalty Tribunal, collected by the Copyright Office, distributed in accordance with the directions and adjudications of the Copyright Royalty Tribunal, and all of this is subject to judicial review.

The third point is to identify an area which I think you really could eliminate from the discussion, for all practical purposes. There is much debate about whether or not the Sound Recording Act of 1971 included a home audio taping exemption, whether any such exemption was imported sub silentio into the 1976 revision, and whether so imported, it was expanded to videotaping as well.

The legislative history on these issues is not altogether clear, but they need not occupy this committee's time. What is clear from the legislative history is that the 1971 Sound Recording Act was directed at commercial piracy primarily, and only incidentally was home taping considered, that no one then saw any practical way of controlling home taping; that the Copyright Office at that time advised the Congress that a crunch would come on home taping, and the crunch is now here.

The point is that the Congress here—whatever the result in the *Betamax* case and on whatever rationale—the Congress here is legislating prospectively, and in my view, Mr. Chairman, it should legislate regardless of the timetable for the review of the *Betamax* opinion, if any, in the Supreme Court.

I want to turn now to the question of harm. Before I enter upon a discussion of the potential harm to the copyright industries here involved, I want to make clear my premise that any unauthorized use of copyrighted material is an invasion of the right, and that Congress should be extremely wary in all cases of permitting an impairment or erosion of the basic rights which are declared in section 106 of the statute.

On audio, there really is no question that almost all of the home taping for audio displaces the original, authorized copyright royalty bearing copy. I daresay that in the hearings which will ensue, no one will dare argue to the contrary. In that case, the harm is very clear, palpable, and at the moment, very large. If we turn to video, there is some injury from time shifting, but the primary injury is from taping for what has been called librarying.

Now, much of the debate which has gone on to date in the press, among the public, and in the hearings in Los Angeles has dealt with how much of that home videotaping is done for time shifting and how much of it is done for librarying. Fortunately, in my view, you do not have to spend very much time on that, because your bill, Senator Mathias, contains an automatic mechanism which will concentrate the royalty precisely at the specific point of greatest harm. In order to time shift, the home videotaper needs not more than four or five tapes. He may, under your bill, by the purchase of a machine and the payment of the reasonable royalty which is called for, acquire the power to tape for a lifetime. He may also, by the purchase of not more than four or five tapes, and the payment of a nominal royalty, acquire the capability of taping for a lifetime. Only to the extent that the home taper desires to library will he require the additional tapes, and on those tapes, he will pay the royalty. So there is an elegant and precise mechanism directly in the bill itself which concentrates the royalty precisely on the point of principal injury to the copyright industries.

I want now to turn to point 5, the international considerations which in my view are important. There is no doubt, and there is considerable evidence assembled in our statement to the effect that the marketing of American copyrighted works, motion pictures and recordings abroad is very important to the American balance of payments and promises to become more so as this traffic, in relation to all other international commerce, becomes larger. In two countries already, Germany and Austria, as we explained in our statement, legislation has already been adopted to impose the kind of royalty and the kind of scheme which you propose in your bill. But there is a problem in other countries generally, and the kinds of solutions which you have proposed here are under consideration there. If we do not set an example in the United States by providing for this kind of compensation for the mass use of copyrighted property, it will be impossible for me and other copyright officials and our trade representatives to urge such a course upon foreign countries so that the United States and its citizens may enjoy the royalties which they deserve from the use of their copyright properties abroad.

Finally, as the sixth point and as a general principle, I implore the Congress to be wary of carving exemptions into the Copyright Act. Each one presented may be worthy and may have popular support, but the copyright royalty is a minor component of the final price to the consumer of almost any copyrighted product. But cumulatively, those royalties provide the powerful incentive to support the creation and distribution of copyrighted works to the American public and indeed, to the international public.

That completes my prepared statement, Mr. Chairman. I will be glad to answer any questions you may have.

Senator MATHIAS. Mr. Ladd, I think your statement has been a very strong one and very comprehensive, and I appreciate it. My own involvement in this issue has extended over a long period of time. I first came face-to-face with the general principles that are involved in the famous jukebox legislation that survived from Congress to Congress. We never really got it resolved until we finally passed the Copyright Act of 1976. But I suppose that that controversy lasted almost 20 years, trying to resolve the exemption that had been put into the Copyright Act of 1909 for coin-operated devices. And this is really a technological extension of the principles that are involved in that long-running dispute, and I hope this one can be resolved in less time.

You have mentioned the fact that we are dealing with the protection of the intellectual property of American artists and authors——

Mr. LADD. In truth, it is all artists and authors, but yes, American authors, as well.

Senator MATHIAS. Well, all. But I am thinking now particularly in the context of the use of American intellectual property in other parts of the world.

Mr. LADD. Yes.

Senator MATHIAS. One of the exciting aspects of dealing with this kind of legislation is that we are creating something; we are doing something innovative, I think, and we are dealing with the cutting edge of the new technologies, so that we can take the leading position, I think, in the world, in showing how to do this job. But it is my understanding that in both Great Britain and Germany, they are at least experimenting with other approaches, using a kind of jamming signal whenever a copyrighted performance is being broadcast.

Mr. LADD. May I respond to that—whenever you are ready for me to.

Senator MATHIAS. Well, I am just anxious to know what is going on in other places.

Mr. LADD. In the "Green Paper" which was issued by the United Kingdom government, the possibility was held out of developing spoiler devices to prevent unauthorized copying.

Senator MATHIAS. This would permit broadcast, but simultaneously, the spoiler signal is sent——

Mr. LADD. Would foil the copying. The motion picture industry, for example, has tried to develop such systems and has not really been successful. That came out in the International Conference on

Motion Picture Piracy in Geneva last year. There will be motion picture industry witnesses following me, and they can probably answer that more particularly.

One of the members of our staff has said that the creation of a better mousetrap in terms of spoilers will probably just simply result in smarter mice. And I really do not think that that approach is very promising.

If I may turn my attention to Germany and Austria, I am not aware there of experimentations of a technological nature to foil, but there is in Germany now a proposal to revise the statute which is already in place, and the Austrian statute is only now being fully implemented.

Senator MATHIAS. One of the discussions that was prolonged in the drafting process of this amendment was whether or not we should have attempted to set the royalty fees in the legislation, whether Congress should assume that duty. What is your feeling about that?

Mr. LADD. I think it should not do so for these reasons. The bill provides—your amendment provides for, I think "appropriate and reasonable" is the term, compensation. I would favor allowing the Copyright Royalty Tribunal to operate within that broad standard. If at a later time, the Congress finds that those standards are not satisfactory, it may revise the legislation to insert them. But I am afraid that the insertion, for example, of a ceiling might very well result in something not resembling a market value. I oppose that.

Senator MATHIAS. One final question. The testimony of the Home Recording Rights Coalition asserts that this amendment would jeopardize the existence of 25,000 small business establishments, that a number of the retail establishments that sell and service equipment would find this an unreasonable burden. Do you have any information which would shed any light on this concern?

Mr. LADD. I do not, Senator. I cannot respond to that. My view is that the copyright owner should be allowed to control the exploitation of his property, but on the particular question you are asking as to what effect that will have on the number and size of distribution outlets, I do not know.

Senator MATHIAS. Thank you very much, Mr. Ladd.

[Prepared statement of David Ladd follows:]

STATEMENT OF DAVID LADD
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN OF CONGRESS
FOR COPYRIGHT SERVICES

Before the Committee on the Judiciary
United States Senate
97th Congress, Second Session
April 21, 1982

Mr. Chairman and members of the Committee, I am David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services. I thank you and the Committee for giving me the opportunity to appear here today to testify on proposals to amend the Copyright Act of 1976 (title 17 of the United States Code) with respect to home videotaping off-air of television broadcasts for private use, home audio taping both off-air and from lawfully made and distributed phonorecords, and commercial lending of audiovisual works and sound recordings.

Our statement treats the issues of home videotaping and audio taping separately, because some of the legislative proposals before you have done so and because each has a separate judicial and legislative history. However, the philosophical principles of copyright presented in this statement apply equally to both. In the last part of our statement, we comment on the separate issue of a commercial lending right for motion pictures and other audiovisual works and sound recordings. The statement is organized as follows:

INTRODUCTION

SUMMARY OF COPYRIGHT OFFICE VIEWS

PART ONE: HOME VIDEOTAPING

I. DeConcini Bill-Mathias Amendment

II. 1976 Copyright Act and Its Legislative History

III. Economic Impact of Home Videotaping

PART TWO: HOME AUDIO TAPING

I. Mathias Amendment

II. Legislative History Regarding Audio Taping

III. Economic Impact of Home Audio Taping

PART THREE: INTERNATIONAL ASPECTS OF HOME TAPING

I. United States' Leadership Role

II. Foreign Systems Compensating Copyright Proprietors for Home Taping

PART FOUR: COMMERCIAL LENDING RIGHT FOR MOTION PICTURES AND SOUND RECORDINGS

I. Background and the Problem

II. Copyright Office Position

CONCLUSION

INTRODUCTION

The Betamax decision[1] brings us here: the Court of Appeals for the Ninth Circuit has held that off-air home videotaping of copyrighted television programs for private use infringes the copyright in those audiovisual works, and that the manufacturer, distributor, and retail vendors of the videocassette recorders (VCR's) used to tape the copyrighted works are liable as contributory copyright infringers. The issue in these hearings is whether the Congress should prospectively reverse or modify that judicial result, or leave it unchanged.

The Congress does not approach this question as a matter of appellate review of the court's interpretation of the present statute but rather as the law giver, determining whether that statute, as interpreted in Betamax, shall stand or be changed; and if changed, how. The Betamax case, dealing with videotaping, has also entrained the related issue of home audio taping, and both issues are present in bills before this Committee.

The Congress, and this Committee in particular, are to be congratulated. The Betamax decision sounded as a thunderclap over the entertainment industries and the copyright world. The reaction to the decision was in many cases emotional and sensational. There was, in my view, a concerted effort by some [illegible] the contending interests to overstate and distort the Betamax holding and to stampede the Congress into hasty and scantly considered action. To that end, reaction and opinion within the press and among the public were agitated. These hearings, at a remove of six months from the Betamax decision, together with those which have already commenced in the House of Representatives, will allow the complex and serious issues to be fully and calmly examined.

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[1] Universal City Studios, Inc. v. Sony Corp. of America, et al, 659 F. 2d 963 (9th Cir. 1981). A copy of this decision is appended to this statement. App. I.

Let us at the outset make clear what everyone agrees upon: no one seeks to forbid anyone from taping either audiovisual works (mostly movies) or sound recordings, copyrighted or not, on his or her home set for personal use. Every bill before the Congress expressly permits that. No bill before the Congress would prevent that.

What is at issue is whether copyright owners shall in some way be reasonably compensated for the use of their copyright property.

This is a large and important question. The stakes are great. That will be attested to in these hearings where the central clash will be between two camps of commercial interests: the manufacturers and importers of recording tapes and recording machines on the one hand, and copyright owners (primarily motion picture and television production companies, music publishers, and recording companies) on the other.

As important as the issue of home recording is independently, however, it is nonetheless merely a particular expression of a general, serious, and growing problem in copyright: the adaptation of legal doctrine and principle in copyright to new technologies. This problem is not new. The comprehensive revision of our copyright statute in 1976 had the underlying purpose of adapting the law to the various technologies — e.g., radio, television, and cable — that had emerged after the last general revision in 1909. But the problem and the task of adaptation continues, and grows more serious, because technology — including recorders, photocopiers, and computers — vastly expands the opportunities for copyrighted works to be replicated and used without the owner's control, or even knowledge. And the pace of technological innovation is itself accelerating.

Aside from photocopying, another dramatic present-day example of the strains technology has placed on the copyright system is the unauthorized interception of programs carried by satellite. Transmission by satellite — whether for cable, subscription television, or over-air broadcast delivery to the viewing consumer — is recent. But already the price of home earth stations is plummeting;[2] consumers are buying them in greater numbers; and the unpaid-for interception and use of programs for which others pay is increasing.[3] And looming on the horizon is the problem of the use of copyrighted works in data bases and their use in homes by customers with personal home computer terminals.

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[2] A consumer can now acquire a satellite dish for as little as $2,500. In 1978 they cost about $25,000. Wall St. J., April 2, 1982, at 25, col. 1. This sharp decrease in price is similar to the decrease in price of VCR's that marked the beginning of the consumer explosion. In 1971 the total VCR aimed at the educational and institutional market sold for about $200,000. A U-matic deck was available for from $1900-$2800; the first recorder aimed at the consumer market and sold with a 25" color set cost only $1700 but did not work properly. TELEVISION DIGEST, June 12, 1972. By 1977 a VCR was selling for as little as $995. CONFERENCE ON VIDEO RECORDING FOR EDUCATIONAL USES 20 (July 19-22, 1977) (statement of Ken Winslow). *See also* Rothbart, *Scrambling To Keep Up With the Joneses: Mushrooming private earth stations prompt debate over programmers' counter-attack*, CABLEVISION PLUS, April 5, 1982, at 15-16.

[3] Legislation is under consideration elsewhere in the Congress to control piracy of satellite-relayed signals. H.R. 4727, 97th Cong., 1st Sess., 1981 (Mr. Waxman), and S. 2172, 97th Cong., 2d Sess., 1982 (Sen. Goldwater).

I mention these developments only to underline the proposition that home taping is a particular example of the strains of adapting copyright, and the basic scheme of reward and incentive it represents, to technology whose benefits are increasingly enjoyed by wider and wider sections of our population. Accordingly, there is a growing problem in vindicating copyright as the principal conduit of reward between the consumers who use and enjoy the works and the authors and entrepreneurs who create and make them available.

From the beginning, however, copyright has been deemed so essential to the national welfare that express provision was made for it in the Constitution. In our system, copyright is an instrument of property which, in context of freedom of contract and a market economy, allows the public to use the work and pay the author what the public thinks the work is worth.

This property-right orientation of our law has sometimes led to articulation of the idea that the author's right is not absolute, but is to be balanced against the public's need for access. Within this philosophical strain, the principle of fair use has been developed and elaborated, and compulsory licenses introduced into our law. Always, however, in this balancing, the law has been wary of the impairment of the author's property by unpaid use. For example, our statute in 1976 for the first time expressly incorporated a declaration of the fair use doctrine, earlier developed in court decisions, but mandated that in its application attention be paid not only to proven harm but to the effect of the use "upon the potential market or value of the copyrighted work."

In recent years, voices have arisen and grown louder, declaring the view that not merely limited and principally noncommercial free use should be allowed of copyrighted works, but general and mass copying — even for what the Court of Appeals in the Betamax opinion characterized as "intrinsic use."

That issue will not go away. It dominates the home taping question, and it will loom large in the future of photocopying and, in ways less clearly foreseen but indubitably large, the use of copyrighted property in computer programs, computer data bases, and works generated by computers.

Authors and copyright owners are, because of their creative and entrepreneurial talents, a unique group. They are a minority that cannot readily mobilize vast popular support on legislative issues, particularly copyright ones, which affect their interests directly and, ultimately, ours as well. That is true especially when the public is offered the choice of using copyright property for free — or ostensibly for free. But because their contributions to the nation's welfare, culture, and economy are great, the protection of their interests lies on our conscience not only as a matter of sound policy but of equity.

SUMMARY OF COPYRIGHT OFFICE VIEWS

The Copyright Office endorses the Mathias Amendment No. 1333 to the DeConcini Bill, S. 1758. Specifically, if the Copyright Act of 1976 is to be changed prospectively to alter the result of the Betamax case, the Office supports legislation that would compensate authors and copyright owners for home video and audio taping of their works. The Office also supports the portion of the Mathias Amendment (SEC. 5) which would accord a commercial lending right to motion pictures (and audiovisual works in general) and sound recordings.

A. Brief Comparison of S. 1758 and the Mathias Amendment

The DeConcini Bill, S.1758, would add a new Section 119 to the Copyright Act exempting from any copyright liability uncompensated off-air videotaping for private use. It would exempt such videotaping in terms so broad as to permit noncommercial tape-to-tape duplication, tape swapping, and the like. The Copyright Office believes this exemption would constitute a serious erosion of the legitimate rights of copyright owners. The Office opposes any exemption for home taping without compensation for copyright owners.

As in the DeConcini bill, the Mathias Amendment also would exempt off-air home videotaping for private use, but in addition it offers a workable means of remunerating copyright owners, without impinging upon home privacy or ownership of home recorders. Under the compulsory license mechanism of the Amendment, manufacturers and importers who distribute hardware or blank tape would pay a royalty, at rates set by the Copyright Royalty Tribunal, which would then distribute the money to copyright owners.

The Copyright Office prefers the market and private collecting societies[4]/over government-administered systems. In this case, the compulsory license concept is accepted by copyright owners as at least an initial or transitional step for accommodating their interests and the interests of purchasers of videocassette recorders (VCR's). The Copyright Office supports the principle of the Mathias Amendment on the same basis.

The Mathias Amendment also exempts home audio taping off-air for private use. Unlike the video portion of the Amendment, the audio portion also exempts home duplication from a lawful copy into the same or a different format — e.g., disc-to-tape, or tape-to-tape. The compulsory license mechanism is intended to compensate copyright owners for both forms of audio taping. The Copyright Office supports compensation for copyright owners for the home audio taping provided in the Amendment.

Key questions under the Mathias Amendment concern the amount of the various royalty rates. The bill mandates the Tribunal to set "fair compensation," and the Tribunal's application of that standard will, of course, be subject to judicial review. The available data regarding similar foreign systems, however, suggest that the fees would be affordable. In West Germany, the total amount collected in 1980 through a surcharge on audio hardware was $15,000,000— a one-time charge of $1.21 per machine.[5] In Austria, the surcharge on blank tape amounts to approximately 5 cents per hour tape.[6]

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[4]. References to collective societies are used throughout this paper. A collective society is a private organization which, on behalf of its members, licenses their copyrighted works, collects royalties, and distributes the royalties to members. In the United States, for example, ASCAP, BMI and SESAC are collecting societies.

B. The Historical Context of the 1976 Copyright Act

The principles underlying the 1976 Copyright Act should be considered in assessing proposals, like those now before the Congress, to revise that statute. Among the relevant principles are:

+ the statute accords special protection to audiovisual works;

+ the exemptions for uncompensated use of copyrighted works is especially restricted in the case of audiovisual works;

+ the 1975 Senate Report specifically negates the proposition that the doctrine of fair use can legitimately be invoked to excuse the copying of audiovisual works on the basis of "convenience" to users.[7]

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[5] BILLBOARD, May 23, 1981, at 6.

[6] BILLBOARD, Feb. 6, 1982, at 1.

[7] S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) at 66.

The debate is bootless and sterile about:

(1) whether the Sound Recording Act of 1971 included a home audio taping exemption

(2) whether any such exemption was imported *sub silentio* into the 1976 Revision and

(3) whether any such imported exemption was extended to home video taping.

The Congress here legislates for the future, on the basis of present knowledge of present reality.

C. Economic Impact of Home Taping

Ownership of home taping equipment, audio and video, is growing rapidly. So also are sales of blank tapes for use with the machines.

In the case of home videotaping, the parties dispute — on the basis of conflicting evidence — how much home taping is done for time-shifting and how much for "librarying." By any calculation, however, substantial librarying is occurring; and, it is precisely such librarying which most threatens copyright owners' markets.

In the case of audio taping, no one seriously denies that nearly all home reproduction is done for "librarying," including even "customizing" — *i.e.*, creating new anthologies of individual performances from various sources. Thus, nearly all audio taping from transmissions tends strongly to pre-empt the copyright owners' markets, or displace their products from those markets.

The motion picture and television program production industries are facing rapidly escalating costs. Increasingly, they must look to subsidiary distribution markets as the principal means for recouping their investments and making profits which fuel the creation of new works. Many of the most attractive subsidiary markets are recent outgrowths of new technology. Thus, today, subsequent markets after first theatrical release follow a careful sequence: the sale and rental of videocassettes to the public, cable licensing, network showings, and television syndication.

The expanding ownership of VCR's and the widening practice of home taping menaces the newest of these subsidiary markets — the sale and rental of videocassettes.

The Mathias Amendment allows home taping and provides for reasonable compensation to to copyright owners by means of a royalty on VCR's and blank tapes. By an automatic mechanism within the system for collecting the royalty, the Mathias Amendment keys the royalty to the principal harmful use — librarying.

D. International Implications of Home Taping

Despite the decline of numerous American industries in relation to foreign competition, the United States has retained its pre-eminence in the field of motion picture and television production. We are the world's leading exporter of motion pictures. Revenues from licensing U.S. motion pictures abroad account for about 50 percent of the recovery of production costs of U.S. films. Those revenues are an important component of the American balance of payments and promise to become even more so.

Because of our technological, political and creative pre-eminence in world telecommunications, our resolution of the home taping issue will set an example for action by other industrialized nations, in many of which U.S. copyright industries earn significant royalty income. As a net exporter of the copyrighted properties affected by home taping, the United States has a interest in encouraging other countries, by our example, to extend copyright protection to home taping.

E. Commercial Lending of Motion Pictures and Sound Recordings

With the advent of the VCR has come a new market for audiovisual works — the commercial sale and rental of prerecorded cassettes. The Copyright Office believes that copyright owners should be assured a reasonable share of the rental market for motion pictures and sound recordings. Accordingly, the Office supports the grant of a commercial lending right to owners of audiovisual works and sound recordings. The Mathias Amendment, in Sec. 5, creates such a right by narrowing the present limitation in Sec. 109 of the statute, governing the exclusive right of public distribution. The Copyright Office favors it.

PART ONE: HOME VIDEOTAPING

I. DECONCINI BILL AND MATHIAS AMENDMENT

A. Objectives of the Proposals

The DeConcini bill, S. 1758, broadly exempts all individual recording of copyrighted works on video recorders provided the recording is made "for a private use" and is not used "in a commercial nature." It appears to create a total exemption from copyright liability for a broad range of noncommercial videotaping activities, embracing not only off-air taping of all types of copyrighted transmissions, including those of traditional broadcast, subscription, and cable television, but also home tape-to-tape duplications, tape swapping, and the like.

The Copyright Office believes that such an exemption, standing alone, would represent a grave derogation of copyright owners' exclusive rights, going beyond those contemplated by the trial court's opinion in the Betamax case.[8] We oppose such an inroad on copyright owners' property.

The Mathias Amendment, No. 1333, on the other hand, adapts the DeConcini bill's principle of relieving home owners of the hazard of infringement for private off-air videotaping while assuring owners of copyright in reproduced televised audiovisual works payment for such activities. It offers a means of remunerating owners for private videorecording off-air, without impinging upon home privacy restraining sales or of recorders or tape. The Copyright Office supports the principles undergirding this proposal.

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[8] Universal City Studios, Inc. et al. v. Sony Corp. of America, et al., 480 F. Supp. 429 (C.D. Cal. 1979).

The Mathias Amendment protects copyright owners by affirming their exclusive right to copyright protection against the unauthorized reproduction of their works by "home video recording devices and media." This broadly acknowledges copyright protection against any type of unauthorized reproduction, including off-air taping of all types of video transmissions and duplication by tape-to-tape copying and similar means of reproduction. At the same time, persons who make home videorecordings from commercial, subscription, cable, or other television broadcasts[9] for private use are protected from liability for such videotaping. Those engaging in tape-to-tape duplication, tape swapping, and other public activities would not be insulated from liability.

Finally, the Amendment grants the VCR owner the privilege of home videotaping off-air for private use by establishing a compulsory license for importers and manufacturers of recording machines and media who commercially benefit from such private use.

B. Comments on the Principle of the Compulsory License

A compulsory license, in the Copyright Office's view, is a legislative device warranted only under special circumstances.[10] Off-air videotaping in the home for private use is one case where such a solution seems

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9. Although home taping of programming from services such as cable and pay-TV was not at issue in the Betamax case, arguably even more justification exists to find such taping a copyright infringement, since viewers pay to receive those broadcasts, and free taping may deprive the copyright owner of a paying viewer market. These issues are presently before a Federal District Court in California in Universal City Studios, Inc. v. RCA Corp., Civ. No. 81 5723, filed Nov. 6, 1981 (C.D. Ca. 1981).

10. The Court of Appeals in Betamax raised the possibility of a judicially imposed compulsory license as part of the final decree in that case, in lieu of the usual permanent injunction.

necessary.[11] To affirm the principle of copyright liability for home videotaping activities, as the appellate court's Betamax decision did, is to leave unanswered the further practical questions of what amount should be paid, to whom, and how. Normally, the market would permit owners and users to bargain out the price, and the copyright owner or his or her licensee then distribute the proceeds to authors, performers, and other contributors. And normally, the Copyright Office would favor a private contract solution.

The Copyright Office has recently testified before this Committee on its belief that copyright owners should fully enjoy all their property rights, and that compulsory licensing systems, which permit someone other than the copyright owner to decide how that owner's property is used and what value it has, should be employed sparingly and only where necessary.[12] Marketplace solutions are preferable. In some cases, however, the nature of the market makes such individual bargains between copyright owner and user impossible. The Congress concluded in the 1976 Revision, for example, that that was the case for cable television, and opted for a compulsory license solution.

In cable, the owners and users were, when the revision was passed, identifiable but so large in numbers that individual bargains on each copyrighted property were practically impossible. In home taping there is the additional problem that home taping is out of sight, neither identifiable or countable. It is impossible to insert the "box office" anywhere between the copyrighted work and the taper; and therefore an indirect measurement — that is, a measurement of the materials, the machines and the tapes — becomes the only feasible "meter" for copying. The royalty proposed in the Mathias Amendment, therefore, seems to us not an optimal, but the only feasible method of counting and compensating for home taping of copyrighted works.

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[11] The present copyright statute creates compulsory licenses in four cases: for the performance of recorded nondramatic music on jukeboxes (17 U.S.C. §116); for the production of phonorecords of previously published and recorded nondramatic music (17 U.S.C. §115); for the cable retransmission of broadcast radio and television programs (17 U.S.C. §111); and for the use by public broadcasters of published, nondramatic music and published pictorial, graphic, and sculptural works (17 U.S.C. §118).

[12] Oversight of the Copyright Act of 1976: Hearings on Cable Television Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 3, 6 (Serial No. J-97-20 1981) (statement of David Ladd).

C. The Compulsory Licensing Mechanism

The statutory compulsory license would automatically permit off-air home videotaping of television transmissions by broadcast stations, cable systems, multipoint distribution services, subscription television services, and the like for private home use, upon the licensee's filing timely notices of identity statements of account, and periodic royalty fees with the Copyright Office. The provision places sole responsibility for royalty payments on the manufacturers and importers who distribute domestically, and profit from the commercial sale of, home videotaping machines and blank tapes. An existing independent regulatory body, the Copyright Royalty Tribunal,[13] would adjust rates periodically and distribute royalties to entitled copyright owners.

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13. The Copyright Royalty Tribunal is involved, to varying degrees, in administering and adjusting rates for the existing compulsory licenses under the Copyright Act. With respect to the collection and distribution of royalties the proposed schedule follows the pattern set for cable retransmissions. 17 U.S.C. §111.

As in the compulsory licensing scheme for cable in the copyright statute, the Copyright Office would play only a minor role in the compulsory license for home taping: it would collect royalties and, after deducting reasonable administrative costs, would deposit the balance with the U.S. Treasury for investment in interest-bearing U.S. securities.

Under the Mathias Amendment, royalty rates would be set by the Copyright Royalty Tribunal after hearings with interested parties. They would be calculated as a surcharge on the price of videorecording hardware and blank tapes or other recording media that are imported or manufactured and distributed domestically. Under subsection (c)(2) of proposed section 119, the fees would be calculated to "afford to copyright owners of motion pictures and other audiovisual works a fair compensation for the use of their creative works," and could be reduced by the estimated amount of such media principally used for purposes other than home taping of copyrighted audiovisual works. Rates would be adjusted every five years, beginning in 1985, and, as with other Tribunal proceedings, would be subject to judicial review under §810 of the current Copyright Act.

Subsections (c)(4) and (5) of proposed section 119 of the Mathias Amendment provide for annual distribution of these compulsory license fees to owners of copyright in motion pictures and other programs shown on television who have filed claims with the Tribunal. Claimants may file claims jointly or singly, and may agree among themselves as to the division of fees. As with other compulsory licenses now administered by the Tribunal, where controversy about the distribution arises, the Tribunal would determine how much of the royalty pool each claimant or group should receive.

II. COPYRIGHT ACT OF 1976 AND ITS LEGISLATIVE HISTORY

The Copyright Office believes the provisions of the DeConcini bill and the Mathias Amendment can be usefully examined in the context of the legislative history of the present statute.

A. Framework of the 1976 Copyright Act: An Attempt to Anticipate Technological Developments

Congress undertook the revision of the Copyright Act over the period 1955-1976, when videorecording technology was emerging. In several limited cases, specific exemptions were established in the statute permitting off-air videotaping to accommodate certain special needs. Yet, Congress chose not to provide any specific blanket exemption for home videotaping.

The basic philosophy of the 1976 Copyright Act was influenced by the perceived tendency of prior copyright laws to become outdated upon the development of new technological means for exploiting works of authorship. As in other areas of the law, the copyright law can not always foresee changes — technological, market, or social — and comprehensively provide for them prospectively. Thus, the 1976 Act had as a major purpose to adapt the copyright law to new technologies — television, cable television, and photocopiers, for example — which had appeared and established markets in the interval after the earlier comprehensive revision in 1909.

The framers of the 1976 Copyright Act intended to address this problem of an on-going adaptation by drafting a statute to accommodate new technologies.

The First Supplementary Report of the Register of Copyrights expressed this intention:

> In a narrow view, all of the author's exclusive rights translate into money: whether he should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.
>
> Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.14/

The design for achieving a statute capable of taking into account future innovations was the very architecture of the statute. In that design, section 106 sets forth in broad terms the copyright owner's exclusive rights

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14. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright law: 1965 Revision Bill, Copyright Law Revision Part 6, at 13-14, 89th Cong. 1st Session (1965). (Hereafter, the Register's 1965 Supplementary Report). (Emphasis added.)

of reproduction, adaptation, publication, performance, and display. Following this broad provision are specific provisions establishing various limitations, qualifications, or exemptions.[15] Thus, under the theory of the 1976 Act, unless a use of a work is specifically exempted from copyright liability, its use falls within the exclusive rights of the copyright owner.

B. Statutory Treatment of Motion Pictures and Other Audiovisual Works

Making a copy of an audiovisual work under copyright through the use of a videorecorder infringes the reproduction right of section 106. The use of magnetic tape as a means to reproduce a work was anticipated by the drafters of the Revision Bill. That is clear from this reference in 1965 in the Register's first Supplementary Report:

> As noted in chapter 1, "copies" and "phonorecords" together are intended to comprehend all forms of material objects in which copyrightable works are capable of being fixed. Thus, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the copyrighted work is duplicated, transcribed, counterfeited, imitated, or simulated in a fixed form from which (as stated in the definitions in sec. 101) it "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, the exclusive right of reproduction would apply to a copyrighted work as a whole and to any substantial part of it; it would cover not only cases of exact duplication but also cases where, despite wide departures, the author's "expression" rather than merely his "ideas" have been taken.
>
> The touchstone here is the fixation of the work in a tangible object; the showing of images on a screen or television tube would constitute an exhibition under

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15. An additional less specific provision spanning all uses, section 107 (the fair use provision), will be discussed at pp. 24-25 *infra*.

> clause 5 but not a reproduction under clause 1. On the other hand, as long as there has actually been a fixation in some sort of material object, it would not matter if the fixation were impermanent; for example, reproduction on magnetic tape would come within clause (1) even though the tape is later erased. 16/

1. Narrow exemptions for audiovisual works in general.

Throughout the 1976 Copyright Act, Congress has manifested an intention to provide a high level of protection for audiovisual works, irrespective of whether or not uses are made for profit. Many of the exemptions established by sections 107-118 are specifically made inapplicable to motion pictures and other audiovisual material. Section 108(h), for example, makes the library reproduction privileges generally inapplicable to "a motion picture or other audiovisual work other than an audiovisual work dealing with news." With one exception, the numerous limitations on public performance rights established by section 110 do not apply to motion pictures and other audiovisual works. The exception is section 110(1) relating to face-to-face teaching activities, and this provision contains a proviso requiring that the performance be given by means of a copy "lawfully made." The provisions relating to ephemeral recordings are inapplicable to motion pictures or other audiovisual works by virtue of section 112(a). Finally, section 118(f) precludes noncommercial broadcasters from making a use beyond the limits of fair use of any portion of an audiovisual work.

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16. Register's 1965 Supplementary Report, at 16-17. (Emphasis added.)

2. Videotaping provisions.

Although home videorecorders were arriving on the market when the 1976 Copyright Act was passed, the statute understandably deals with off-air videotaping in only a few cases. Section 108(f)(3), for example, provides that "nothing in this section shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program," subject to the conditions of 17 U.S.C. 108(a). The 1976 House Report noted in regard to section 108(f)(3) that:

> It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. As such, it is an adjunct to the American Television and Radio Archive established in Section 113 of the Act which will be the principal repository for television broadcast material, including news broadcasts. The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause. [17]

In another reference to off-air videotaping, the Conference Committee expressed its view that some off-air videotaping by nonprofit institutions serving the deaf and aurally handicapped would, under certain constraints, fall within the scope of "fair use."[18]

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17. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 77. (Hereafter, the 1976 House Report.)

18. H.R. Rep. No. 94-1733, 94th Cong., 2nd Sess., at 70; See also, 122 CONG. REC., 94th Cong. 2d Sess., Sept. 22, 1976 at H. 10875.

Finally, section 118(d) establishes limited off-air videotaping privileges for governmental bodies and nonprofit institutions with respect to nondramatic musical works and pictorial, graphic, and sculptural works contained in public (noncommercial) broadcast programs. This provision, however, does not extend to other works in the transmission program, or to motion pictures and other audiovisual works, or to the entire transmission program.

3. Fair use provision.

Despite the absence of an explicit exemption for home videotaping, proponents of unrestricted videotaping have often cited the fair use provision of section 107 in support of their views. Yet the terms of that provision and its legislative history do not support such a sweeping interpretation.[19]

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[19] Section 107 in full provides as follows:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

None of the purposes articulated in the above provision fits home videotaping. Clearly a copy of an audiovisual work taped for personal enjoyment and convenience does not qualify as "criticism, comment, news reporting, teaching, scholarship, or research."

Likewise, the four factors listed in section 107 would not excuse unrestricted videotaping, as the Ninth Circuit held in the Betamax case. The first factor, concerning the character of the use, contrasts commercial uses with nonprofit educational purposes. Its impact on home videotaping is inconclusive: such a use would be neither a commercial use, nor an educational use. The second factor, relating to the nature of the work, establishes a somewhat higher degree of insulation from the fair use exemption for highly creative works, as distinguished from informational works. On this score, motion pictures number among the most complex and creative of works protected by copyright. The third factor concerns the amount which is reproduced. Videotaping generally reproduces the whole work, and fair use is seldom justified in such cases. The final factor invokes the effect of the use upon the potential market of the work. On this matter, it appears clear that the marketing of motion pictures, either in the form of authorized copies or the licensing of repeat performances, may be adversely affected by home videotaping.

Within the context of educational uses, both the Senate Judiciary Committee and the House Judiciary Committee in 1976 considered the application of fair use to off-air videotaping. Although both Committees felt in certain limited circumstances the fair use doctrine could be invoked, neither Committee endorsed the general copying characteristic of home videotaping. In discussing the application of fair use, the Senate Judiciary Committee stated, in part:

> The Committee's attention has been directed to the special problems involved in the reception of instructional television programs in remote areas of the country. In certain areas it is currently impossible to transmit such programs by any means other than communication satellites. A particular difficulty exists when such transmissions extend over several time zones within the same state, such as in Alaska. Unless individual schools in such states may make an off-air recording of such transmissions, the programs may not be received by the students during the school's daily schedule. The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a "fair use." The committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered "fair use." 20/

The report of the House Judiciary Committee stated, in part:

> The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress. 21/

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20. S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) at 65-66. (Emphasis added.)

21. 1976 House Report, at 71-72. (Emphasis added.) Guidelines for off-air taping of copyrighted works for educational use have now been developed. The text appears in 127 CONG. REC. E4750-51 (October 14, 1981).

C. Conclusion Concerning Legislative History

In summary, the 1976 Copyright Act purposefully establishes a high level of protection in order to provide the needed incentive for the production of intellectual property. Under the scheme adopted by the statute, exploitation of copyrighted material by new technologies will generally be subject to copyright liability, in the absence of a specific exemption.

At the time of passage of the 1976 Copyright Act, videotaping was a known technology, yet no specific exemption was included in the legislation to exempt the practice in the home.

Motion pictures and other audiovisual works are highly vulnerable to copying[22/] — that is, a small amount of unauthorized copying injures the incentive to create such works. This is so because the capital investment is high, the risk of loss on any given work is large, and unauthorized copies tend to satisfy fully the demand for the lawful copy. For these reasons, the 1976 Copyright Act at many points treats audiovisual works more favorably than other classes of works.

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22. See, for example, the discussion regarding the reasons for excluding motion pictures from the ephemeral recording exemption in H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967) at 61.

III. ECONOMIC IMPACT OF HOME VIDEOTAPING

During the last ten years the traditional home video market has been revolutionized. Technological advances and innovations — cable, subscription television, and satellites, as examples — have expanded delivery systems for programs. New products, like videocassettes, have appeared which use the television set to provide additional forms of home entertainment. VCR's and video games are already in millions of homes. A 1977 study observed that "video tape recorders and video games when implanted in a few million homes will significantly upset the concept of prime time and drastically alter television as we know it today."[23]

Because these upheavals in the technologies and distribution of entertainment programs are recent, it is too early to tell, beyond a near horizon, the ultimate economic effect of these innovations on the traditional video entertainment industries — the motion picture industry and television broadcasting. Significant probable economic effects can, however, be predicted.

The Copyright Office has not conducted any independent economic research of this issue. Necessarily, we must rely upon various published studies, including those by the contending interests on the legislation before you. The Copyright Office has not reconciled the varying data there presented. It was not easy for the courts to do so in the Betamax litigation. It will likely be difficult in these hearings.

We do believe, however, that there are sufficient data to demonstrate that copyright owners would necessarily be harmed by uncontrolled home taping.

In the case of motion pictures, this conclusion rests on the proposition that motion pictures must recapture a large part of their expenses and realize any possible profits in subsidiary markets threatened by home taping.[24]

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[23] Chew, Innovators in Video—Nightmare for Networks, ADV. AGE, May 3, 1977, at 3.

[24] In the case of audio recordings, the conclusion is based upon the fact that nearly all home taping substitutes for the copyright owner's protected commercial product; and that analysis appears in the section, ECONOMIC IMPACT OF AUDIO TAPING, at pp.39-43 infra.

A. Video Studies Evaluating Industrial Impact of Home Taping

The problems in evaluating the results of the various studies [25] examining the impact of off-air video recording to the motion picture and television production industries include the extent to which (1) the survey audiences are representative, [26] (2) the response sought by the surveyor shaped the questions, [27] and (3) the answer given supports the conclusion made. [28] Although under these circumstances the results of the surveys are not conclusive, all the studies point to an expanding market for VCR's and blank tapes, suggesting an adverse effect on the copyright proprietor.

It is not clear exactly how many blank tapes the average VCR owner has purchased. The most recent study estimates that the average owner has purchased 26.8 tapes, and only 2.7 of these are prerecorded. [29] The estimate is based on a survey of tapes purchased in 250 VCR households instead of actual sales figures.

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[25] These studies include: Crossley Study for Sony, the Field Study for Universal and Disney, a Media Statistics Study for the Corporation for Public Broadcasting, and an ongoing Media Statistics Study, and the UCLA study for Paramount. See App. II. Other studies have been made but were not made available.

[26] Although the size of the audience polled ranges from 250 to 1,310 responses, the audience comes from people who have not only purchased VCR's but have shown some interest in buying software, e.g., buying cassettes, subscribers to Fotomat, or Video Review Magazine. See App. II. Thus, it is not clear to what degree the response is weighted toward the videophile instead of the average video consumer.

[27] It is clear that the UCLA study attempted to determine what made some people want to go to the movies, as opposed to what made others prefer to use a VCR. The Corporation for Public Broadcasting study compared recording of regular and public television programs. In some cases the questions were not made even available, and only a summary of responses was given.

[28] The questions on the UCLA study, for example, are based on sliding scale responses from strongly disagree to strongly agree. Thus, from these reponses several possible conclusions may be drawn.

[29] Summary of one week diaries kept between September 10 and October 17, 1981, by 250 videocassette recorder households. Media Statistics, Inc.

Except for 1980, the information regarding blank tape sales is not complete; however, there are rough estimates of blank tape sales for 1979.[30] Actual blank tape sales in 1980 totaled 19,034,000.[31] The sales of blank video tapes have been estimated at between 11-12,000,000 for 1979. Imports of VCR's have increased dramatically in the past decade from 24,000 units in 1970 to 940,000 units in 1980.[32] Additionally, the Electronics Industry Association (EIA), has reported that sales of VCR's in 1979 were approximately 475,396 and in 1980 approximately 804,663.[34]

B. Dependence on Subsidiary Markets.

As the costs of producing a motion picture or television program continue to escalate, producers have become increasingly dependent on subsidiary markets to recover production costs.[35]

The production and distribution of motion pictures has always been an unusually high risk business. As one long-time financial observer of the business observed:

> ...A good case can be made that production and distribution of pictures for the theatrical market by the American majors, taken as a single unit for the past 20 years, has been a loser. I can think of no other commercial enterprise where the principal business, the very core, has been unprofitable for such a long period, yet the market survives. So the distributors, who take the risk of the production cost in something like 90% of the total dollars involved, are losing their shirts.

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30. 1980 is the only year for which accurate sales of blank tapes are currently available, since no record was compiled before 1979 and the 1981 figures have not been completed. Telephone conversation with International Tape/Disc Association (ITA).

31. VARIETY, Sept. 23, 1981, at 77.

32. Dahlin, Consumer as Creator, PUBLISHERS WEEKLY SPECIAL REPORT 8 (Reprinted for March 20, 27, 1981 PUBLISHERS WEEKLY).

33. 1981 CONSUMER ELECTRONICS ANNUAL REVIEW, at 33.

34. These are sales to dealers. EIA believes that they are the most accurate assessment of total sales to consumers. See 1981 CONSUMER ELECTRONICS ANNUAL REVIEW at 16.

35. See e.g., VARIETY, Dec. 30, 1981, at 1, 24.

> The increasing selectivity of the television market, which welcomes successes and pays well for them but tries to bypass the failures, seems to signal the end of the television salvage operation for the dogs. The increasing difference between pictures for theatres and those for television, both in subjects chosen and the treatment of them, makes television values less sure, even for successes. Thus the television market for features, the great bolsterer of picture values for the risk-takers for the last 10 years at least, may have less backstop effect in the future. The risk-takers will probably not be able, even if willing, to take the same sort of risks again. 36/

Apart from reducing costs, or reducing the number of works created, the principal means for mitigating these risks is copyright control, by distributing the risks of production among licensees who themselves derive value from the public appetite for motion pictures. These licensees historically have been theatrical exhibitors and broadcasters — entrepreneurs who present single performances rather than distribute copies for repeat viewing. The frank alarm with which all those who rely upon these controls have viewed the growth of home recording reflects the fragility of their marketing arrangements, their interrelationship, and the considerable risks that each takes in the exploitation of film and television programming.

1. Production costs: Motion pictures and television

Both motion picture and television production companies face increasingly high costs. The average cost of new feature films rose 51% in 1979 alone, and the negative cost per feature film increased by an average annual rate of 23 percent between 1972 and 1979. 37/ The average negative cost in 1979 was $8,500,000; by 1981, this cost had increased to $9,750,000. The total cost of producing the master negative, making prints and advertising the film is much more.

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36. Howe, Bankers and Movie-Makers, in THE MOVIE BUSINESS 59. (Bluem & Squire ed. 1972).

37. The negative cost is the cost of producing the master or negative film; it refers to the charges and expenses incurred in the acquisition and production of motion pictures, including sound stage, film labs, editing room, construction and raw film stock. 1981 U.S. INDUSTRIAL OUTLOOK, at 531. An indication of rising production costs between 1940 and 1980 can be found in the 1981 MOTION PICTURE ALMANAC.

The costs of television programming have been estimated at from $400,000 to $1,000,000 for a one hour television series episode and from $2,000,000 to $25,000,000 for a theatrical motion picture.[38]

2. The sources of revenue: motion pictures and television

Expenses incurred for the production of television programming are recovered from advertising revenues and program distribution fees. Programs are reused through reruns which play a significant part in recovering production costs[39] and through export to foreign markets.[40] In fact, producers can only recover costs and derive a profit from the syndicated resale of programs to local stations, rather than first sales to networks.[41] Foreign distribution of American programming has become increasingly important: sales of American television programs to foreign countries almost doubled between 1977 and 1980. Although the size of revenues from abroad for 1981 is not yet reported, those revenues will be predictably higher than those for 1980.[42]

The motion picture industry attempts to maximize returns on its product by carefully controlled, sequential distribution: first, to both domestic and foreign theatrical distributors for first run performance;[43] films are then licensed to pay cable (including subscription television); television networks; and finally, to local television stations through syndication markets. Most recently, the sale and rental of prerecorded videodiscs and cassettes has taken its place in this complex system.

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[38] Barkan, Universal v. Sony: Is Home Use in Fact Fair Use 3 J. COMM & ENT. L. 53, 68 n. 93 (1981).

[39] Id. Also for a more detailed discussion, see B. Owen et al., TELEVISION ECONOMICS 17-21 (1974). There are several other possible stages of reuse; including cable sale and late night rerun. See note 42 infra.

[40] For a more detailed discussion of foreign sales, see Part Three, pp. 44-51 infra.

[41] See Grover, Delayed Payoff TV Series Only Becomes Profitable for Producers Upon Syndication, Years After They Are Made, Wall St. J., Dec. 27, 1977, at 26, Col. 1.

[42] See App. III for a summation of foreign television sales.

[43] A popular movie may be released a second or third time. See the Federal Communications Commission's Preliminary Report, AN ANALYSIS OF TELEVISION PROGRAM PRODUCTION, ACQUISITION AND DISTRIBUTION, 158-160 (June 1980), for a discussion of the normal stages of distribution. Exports are given in App. III.

C. Effects of Home Video Recording on the Television and Motion Picture Marketplace

1. Time-shifting and advertisement avoidance: impairing marketability

Presently commercial advertising is a major revenue source for television programming.[44] Although there are insufficient data to indicate whether or not the common practice of deleting advertisements in off-air video recording will reduce advertising revenues, surveys reveal that consumers often do in fact omit commercials when videotaping a program, or use the "fast-forward" feature to skip commercials when viewing a videotaped program.[45]

It can be argued that audience measurement services, such as Nielsen and Arbitron, can include recorded programs in their ratings. However, the impact of time-shift viewing on the ability of program suppliers to continue sequential marketing techniques may still be impaired or even disrupted. The commercial value of a television program is linked directly to the ratings the show receives and the time that the show is aired. Use of the VCR allows the home taper to shift the time at which the program is viewed and to delete the commercial advertising on which the value of the program is based.

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44. This is not only true of network television but also increasingly true of cable, *see* VARIETY, Oct. 5, 1981 at 1, Sept. 25, 1981 at 14, and in the future even *public* television.

45. *See* App. II.

2. Librarying: the uncompensated preemption of subsidiary markets.

The injury to the copyright owner is clearest when the home video recording is retained permanently, or for an extended period of time — commonly referred to as "librarying." Most of the user surveys discussed earlier show that "librarying" accounts for at least 25% and perhaps as high as 75% of home VCR use.[46]

Most surveys also indicate that the average owner purchased three blank tapes when he bought his VCR. After that, estimates of tapes purchased are less harmonious.[47] A few blank tapes — three or four, or even five — are needed for time shifting; additional blank tapes are presumably used to record programs for a permanent collection. While exact numbers are not known, it should be readily apparent that the average consumer owns more tapes than would be necessary for time-shifting alone.

Once consumers are able economically to develop extensive, personal, video libraries, the economic consequences to copyright proprietors will be inescapable.

D. The Mathias Solution: Keying Compensation to Specific Harm.

We have to this point discussed the probable harm from home videotaping to copyright owners. There is a different, but related point to which we now turn: The royalty mechanism of the Mathias Amendment focuses on the point of principal harm — librarying and its displacement of the copyright owners' own commercial product.

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[46] See App. II.

[47] See p. 27 supra.

The Mathias Amendment provides an automatic method for concentrating payments on librarying use rather than time-shifting use.

The parties' surveys conflict on how much taping is done for each purpose. But all studies show that a significant amount is done for librarying.[48/]

In the final analysis, it is not necessary to resolve the issue of how much taping is done for what purpose. Under the Mathias proposal, all VCR owners, by the purchase of their VCR's, would make a one-time payment of a royalty, and would thereby acquire the power to tape on the machine for a lifetime. More tellingly, the time-shifter, by the purchase of not more than four or five tapes, and the payment on them of only a nominal royalty, acquires the power to time-shift on those few tapes for a lifetime.

Only to the extent that the home taper decides to "library" will he or she need to acquire additional tapes. Thus, the royalty falls, necessarily, almost entirely on those very uses — librarying — which clearly displaces the copyright owners' commercial videocassettes. The royalty thus automatically, and elegantly, falls exactly on the use primarily harmful to the copyright owner.

E. Summation of Economic Impact.

As in the classic pattern of television itself, as VCR's become cheaper, the home market for them will continue to expand: 20,000,000 VCR homes by 1990 is clearly in sight. Even before, VCR's will have a significant economic effect on traditional markets.

Both the television and the motion picture production industries are in turbulent waters already. Necessarily they have been increasingly relying on subsidiary markets to survive, and that trend will continue. Home taping threatens a new, but nevertheless major, and growingly important, subsidiary market.

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48. *See* text at note 46 *supra*.

PART TWO: HOME AUDIO TAPING

I. MATHIAS AMENDMENT

Amendment No. 1333 to S. 1758,[49] introduced on March 4, 1982, by Senators Mathias and six co-sponsors as a substitute for the earlier Mathias Amendment, No. 1242, expands the scope of the prospective legislation by adding to the videorecording proposal a new section covering home audio recording.

Section 3 of the Amendment extends S. 1758's exemption from copyright liability for home taping to include private, non-commercial audio taping. It exempts from liability any person who makes a single home audio recording of a musical work or sound recording by taping off air from a radio or television transmission or from a lawfully made and publicly distributed phonorecord,[50] provided the recording is made for the private use of the person or his or her immediate household. Thus, a person is free to reproduce a purchased sound recording onto another medium, such as by transferring a disc to a cassette, but the person is not free to copy a work that was taped by another person. Likewise, the exemption does not authorize the making of multiple copies even from a legally purchased phonorecord, or the distribution (whether commercial or non-commercial) of a lawfully made home tape recording to persons outside the taper's immediate household. It does not permit unauthorized tape swapping, even for non-commercial purposes.

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[49] Amendment 1331, identical with the exception of minor technical changes, was introduced on March 1, 1982, by Senator Mathias and co-sponsored by Senators Baker and Robert C. Byrd. House companion bill H.R. 5705, was introduced on March 3, 1982, by Congressman Edwards and twelve co-sponsors.

[50] Coverage of duplication from a lawful copy to another format is an important distinguishing feature of the audio taping proposal. The video proposal by contrast covers only off-air taping.

Like the videorecording section of the Mathias Amendment, the audio recording portion of that Amendment allows the public to make a single recording at home for private use. The Amendment would create a new section 120 within the Copyright Act. That section would establish a compulsory license for importers and manufacturers of audio recording devices and media. It would also provide for "appropriate and reasonable" rates to be set by the Copyright Royalty Tribunal.[51] The royalties thus collected would be distributed by the Tribunal to owners of copyright in musical works and sound recordings that were included in radio or television transmissions or sold publicly as phonorecords during a particular accounting period. Thus, the system of setting, collecting, and distributing the royalties follows the model for the compulsory license for cable retransmissions of broadcast signals.[52]

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51. A distinguishing feature of the audio proposal is the point at which the surcharge on blank tapes is imposed. The audio proposal defines "audio recording medium" to restrict coverage to media "commonly distributed for use in private homes." The definition of "video recording medium" is broad enough to cover all "raw" media; the Tribunal may, however, allow a deduction for use outside private homes, in calculating the royalty fees.

52. 17 U.S.C. §§ 111, 801-810.

II. LEGISLATIVE HISTORY CONCERNING AUDIO TAPING

The legality of home audio taping, either off-air from broadcasts or directly from phonograph records or prerecorded tapes, was not at issue in the Betamax case. Indeed, the question has never been adjudicated. Nonetheless, in press coverage of the case, academic commentaries and within professional and industrial circles, it has been argued that private audio recording of copyrighted musical works and sound recordings is exempt from infringement under the 1976 Copyright Act. Copyright owners challenge that assumption.

This debate has led into a bewildering maze: 1) what did Congress intend with respect to home taping when the Sound Recording Act was passed in 1971? 2) if an intention can be discerned, was it rejected or carried forward into the 1976 Copyright Act; 3) what is the respective weight to be given to statements of witnesses at hearings, floor managers during debate and passage of legislation, questions of Members of Congress?; and 4) how can one rationalize the silence of one House of Congress on the question with ambiguous discussions in the other body?

But, in the final analysis, consideration of the home taping issue was so scanty in the course of enacting the Sound Recording Act, so secondary to the purpose of the 1971 amendment, that our debate would add little certainty to what we already know. After an extensive trial and much thought, the District Court in Betamax found this history to be instructive and relevant to the issue of videotaping, but, the Court of Appeals found the same history unenlightening and irrelevant.

This issue is indeed a maze; and, it is a maze which the Copyright Office urges the Congress to resist entering. All the statements which have fueled this debate were made in the context of granting new protection to sound recordings against tape piracy; home taping was not the focus of legislation.

Reduced to essentials, the record shows that three Congressmen and the then-Assistant Register of Copyrights (later Register) saw no reasonable means of enforcing proprietors' rights against home taping at the time. And the Assistant Register observed:

> My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future. Other countries have felt it more directly than we, partly because record prices are lower here than, say, in Germany. In that situation there is a range of legal devices for trying to keep the practice under reasonable control. But I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping." 53/

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53. Hearings on S. 646 before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22-23, (1971).

Over ten years have passed since those hearings were held and we know three things: that no one wants to go into any one's home to enforce copyright; that it is unthinkable to deny the public access to home recording technology; and, that the "crunch" is here.

III. ECONOMIC IMPACT ON HOME AUDIO TAPING

Although audio taping technology has been with us since 1947, and home taping took off in the 1960's, it has only been recently that drastic price reductions in home audio taping equipment have made the practice commonplace.[54]

Home audio taping is extensive in every age group, and home tapes substitute for the purchase of commercial recordings. A CBS survey has estimated that the average consumer would buy three out of every four tapes recorded. Undeniably, home taping has reduced the sale of prerecorded tapes and records.

A. Analysis of Audio Taping Studies

There are 98,000,000 audio tape recorders in the United States.[55] Approximately one-half of the population of the United States now has access to an audio recorder; over three-fourths of the population, to an audio player. Of the published studies concerning home audio taping and its effect on the music business, four were examined in the preparation for this statement: the Hamilton study (September, 1979);[56] the Roper study (June 1979);[57] the CBS study (on-going);[58] and the 1980 Warner study that updates and expands a 1977 study.[59]

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54. A 1980 study estimates that 48% of the population now has access to audio tape recorders. The continued expansion of the home audio recording market is reflected in the growth of imports from 1970-1980. See note 69 supra.

55. FORBES, February 15, 1982, at 126.

56. A. W. Hamilton, A Survey of Households with Tape Playback Equipment (Sept. 1979) (prepared for Copyright Royalty Tribunal).

57. Roper Organization, A Study on Tape Recording Practices Among the General Public, (June 1979). (Conducted for National Music Publishers Association and The Recording Industry Association of America).

58. CBS, Summary of Market Survey: "Blank Tape Buyers Their Attitudes and Impact on Pre-Recorded Music Sales." (Fall, 1980).

59. Warner Communications, Inc. A CONSUMER SURVEY (1980).

Although the populations sampled, the questions asked, and the weighting of responses differ all four studies reveal common characteristics in home audio taping behavior and point to the same economic consequences for the recording industry.[60]

All the studies emphasize that most taping is done by young (20-40 year old) professional men. This statistic dispels at least one myth: that the typical audio taper cannot otherwise afford to acquire prerecorded material. In fact, the Hamilton study reported that 70% of the tapers interviewed would have purchased the last item that they taped had they not been able to record it.[61]

All four studies also found that music is taped in relation to its popularity: rock music not only outsells classical music, but it is also more frequently taped by the home user. Although the exact amount of home audio taping cannot be determined, the amount is significant. And increasing.[62]

Many reasons were given for taping music: to acquire recordings which were no longer readily available; to "customize" — that is, to create new anthologies of individual recordings taken from various sources; and generally, "to save money."[63] A significant portion of tapers use material they already own to record a second copy, either for preservation or for use outside the home.[64]

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[60] See App. IV.

[61] See App. IV.

[62] The 1980 Warner report estimates that the percentage of people living in homes with at least one piece of recording equipment grew from 39% of the population in 1977 to 48% in 1980. In the same three-year period, the Warner survey estimates that there were 6,600,000 new buyers of blank audio tape. Warners Communication, Inc., A CONSUMER SURVEY 5, 6. Two 1979 studies found that a significant portion of the people interviewed had taped music within the past year. Another on-going market study reports that the frequency of taping is increasing. See App. IV, col. 4.

[63] The CBS study estimated that as much as 75% of all taping is done for the purpose of "customizing," and that 55% of tapers do so in order to "save money." The Warner Survey differentiates between (1) 45% of tapers who have made at least one tape in order to save money, and (2) 25% who indicate that saving money is the most important reason for taping. The 1979 Hamilton study found that less than 20% of the tapers were motivated by saving money. See App. IV.

Whatever the reasons, home taping often results in lost sales. The Roper study observed that, in theory, if tapers bought 90% of everything they recorded for themselves, sales of singles could be 93% greater, and sales of long-playing albums, prerecorded tapes, cassettes, and 8-tracks could increase by 28%. The Roper study postulates, however, that actual sales increases would not be this high; that a more realistic assessment of lost sales might be the 14% taped from borrowed material.

The CBS study estimates that home taping is responsible for a 20% loss in annual sales, equalling $700-800,000,000. The 1980 Warner study also arrives at a "conservative estimate" of $609,000,000 in losses, derived from a measure of the money spent on blank tapes. This study notes that if tapers bought everything that they recorded, both albums and singles, it would represent a consumer expenditure of $2,850,000,000. The CBS study and most of the other studies base losses only on albums.[65]

All four studies also found that tapers tend to buy more prerecorded music than do non-tapers.[66]

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[64] The 1979 Roper study found that 37% of the total group, and 39% of the adults, taped from their own collections while only 24% used borrowed material. The Hamilton study revealed that 59% of the tapers had taped from borrowed music to some extent (less than 2 hours/month, but only 7% of the tapers had taped more than 6 hours/month from borrowed records. See App. IV.

[65] See the Roper Survey, 8; Hamilton Survey, 7-8; the Warner Survey 16-17; and the CBS summary.

[66] According to a representative for a tape manufacturer, many people buy a new record in order to tape from a record that is in excellent condition. Jim McCullaugh, Recording Acts Help Plug Merchandising Campaigns in BILLBOARD, October 27, 1979, BT-10 (1979).

B. Impact on the Recording Industry

While, on the surface, the recording industry seemed healthy in the late 1970's, one could see signs of economic problems. Between 1977 and 1978, sales of singles remained steady, but those of LP's actually declined. On the other hand, sales of prerecorded cassettes increased by 24,400,000 units, for a revenue increase of $200,200,000.[67] In the five years between 1973 and 1978, cassette sales quadrupled, and there was an 80% increase in sales of prerecorded tapes, cassettes and 8-tracks. Sales of LP's, however, increased by only 22%.[68]

These figures acquire added meaning when compared with sales of blank audio tapes, which also continue to climb dramatically.[69] It has been estimated that 220,000,000 blank cassettes were sold in 1978 and 250,000,000 would be sold in 1979.[70] This may be a somewhat exaggerated estimate. The International Tape/Disc Association (ITA) reports that only about 189,585,000 blank audio cassettes were sold in 1980.[71] Another report estimates that 275,000,000 blank 90-minute tapes were sold in the United States in 1980. (Each such tape is capable of containing two complete LP's.)[72]

A 1980 report noted that 1979 had been the recording industry's second best year so far. The report also noted, however, that shipments of records and

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67. BILLBOARD, June 23, 1979, at 1, 9.

68. Id. at 9.

69. In 1971 approximatey 125,000,000 blank audio cassettes were shipped by sale; by 1981 more than 228,000,000 were. Based on figures reported in BILLBOARD Blank Tape Spotlight, Aug. 26, 1972, at 44, 48 and Merchandising Statistical Issue, March 1982 at 24.

70. Still Growing But Not Without Pains, in BILLBOARD, October 27, 1979, BT-1, 2 (Supp. 1979).

71. RECORD WORLD, Oct. 3, 1981, at 6.

72. DAILY VARIETY , Thursday, January 14, 1982, at 58.

tapes by U.S. manufacturers declined by 6% in units and 11% in dollars from 1978, the industry's peak year.[73/]

Other cautionary signs for the U.S. recording industry were found in rising unemployment figures: in 1979, over 2,000 people from both the manufacturing and recording levels of the industry lost their jobs. Home duplication was considered by an industry source to be a major reason for those dismissals.[74/] During the same period, wages paid U.S. musicians dropped by 12% for the second successive year after a long history of annual increases.[75/] Last year, Warner's, a major producer of entertainment properties, including recordings, laid off 10% of its staff at all levels.[76]

Unit sales of prerecorded music have either remained at the same level or declined within the last few years. At the same time, sales of audio recorders and blank tapes have continued to increase. Since both the quality and price of selections taped at home is competitive, it is reasonable to assume that consumers will increasingly use copyrighted prerecorded material to produce their own unauthorized copies. The resulting decrease in the recording industry's sales has already injured both the industry and the copyright proprietor. It will continue to do so unless payment is made for the use of prerecorded copyrighted music.

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73. BILLBOARD, Apr. 12, 1980, at 1.

74. BILLBOARD, May 30, 1981, at 3.

75 *Id.* at 1.

76. RECORD WORLD, Dec. 5, 1981, at 4. The experience abroad parallels that in the U.S. market. In 1978, 33 million blank cassettes and only 19.6 million prerecorded cassettes were sold in the United Kingdom. It is expected that sales of blank tapes will reach 48,000,000 in 1983. The French recording industry cut back employees on all levels 15% in early 1979. Home taping is given as one reason for these cuts.

PART THREE: INTERNATIONAL ASPECTS OF HOME TAPING

A. UNITED STATES' LEADERSHIP ROLE

How the United States resolves the problem of home taping is important in international commerce for two reasons. First, the market for new technology in the United States is among the most highly developed — and is presently and potentially among the largest — for the hardware, the films, the music, and the recordings. Consequently, our actions on the legislative issues before you will be an example for the many industrialized countries currently considering whether to protect copyright owners against the burgeoning practice of home taping. Second, because the United States is a net exporter of the copyright properties involved in these issues, a high level of protection abroad for our authors is clearly in the national interest. Bluntly, if we, a major exporting country, will not compensate copyright owners for home taping, how can our copyright and trade officials urge such a course upon foreign countries where important revenues for America are earned?

Copyright protection against unauthorized off-air and tape-to-tape copying is now being debated in the legislatures of America's principal trading partners, particularly in Western Europe. In Japan as well, the Government has called upon the affected industries to formulate solutions to the home taping problem.77/ And even the countries that presently afford

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77. Article 30 of the present Japanese Copyright Act authorizes reproduction for private purposes. Japanese Authors' Societies and the Japanese phonographic industry are seeking a change in Article 30 to impose on the makers of recorders an obligation to pay compensation. A Subcommittee was formed to study the home taping issue, but agreement on the issue did not materialize. The Japanese Government is encouraging the continuation of meetings between the copyright interests and manufacturers in order to achieve an agreement on the controversial issue. Letter from Yutaka Kimura, Deputy Director, Copyright Division, Cultural Affairs Department, to Patrice Lyons, Attorney-Adviser, Copyright Office, August 17, 1981. (Unpublished; attached as App. V).

some legal protection against home taping — West Germany and Austria — are debating either the revision of the law or the most appropriate means of implementing it. Thus, the United States has an immediate opportunity to influence the unsettled legal questions surrounding home video and audiotaping by providing a legal exemplar.[78] Enacting the Mathias proposal would afford an added benefit to American copyright proprietors to receive monies collected by foreign collecting organizations for home taping of American programs abroad. Without a domestic distribution mechanism in place, even foreign countries who do have home taping copyright protection might be practically unable to distribute royalties to U.S. creators.

The precedential value of the United States' action is particularly important because, as the principal worldwide exporter of motion pictures[79] and television programming,[80] and a net exporter of sound recordings,[81] we have an important stake in foreign and international law regulating these kinds of property.[82]

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[78] In Japan, for example, the Subcommittee authorized to study the issue of home taping suggest it was "still necessary to gauge the general trend of world opinion on how to solve the problem." Ibid.

[79] United States motion picture films occupy close to 40% of free world screen time. 1981 U.S. INDUSTRIAL OUTLOOK, at 531. See App. III for an estimate of motion picture sales to foreign countries from 1977 to 1980.

[80] American television producers also depend on reruns to recover a significant part of production costs, Barkan, supra note 153. An estimate of sales of television programs to foreign countries from 1977 to 1980 appears in Appendix VI. See also, T. Green, THE UNIVERSAL EYE: THE WORLD OF TELEVISION (1972). Green reviewed television programming in 40 countries and found that while each country is determined to do its own programming, there is still a universal appeal of certain American television shows such as westerns and "I Love Lucy." Id. at 11-12.

[81] See, e.g., "U.S. Trade Shift In Selected Commodity Areas," U.S. International Trade Commission Publication No. 1187, Sept. 1981.

United States programming is widely used abroad, particularly in western Europe.[83] The Department of Commerce estimates:

> In recent years, remittals of receipts for U.S. film rentals from abroad have accounted for about 50 percent of the total cost of producing films. If this source of revenue were to diminish, it would probably be financially impossible for U.S. film producers to continue producing and distributing quality pictures.[84]

Projections indicate that with the expansion of communications technology abroad, the use of U.S. telecommunications programming will increase, making sizeable contributions to our future balance of trade. Undoubtedly the revenue achieved through subsidiary markets, including foreign rentals, will be affected by the growth of home videotaping abroad. Some in the industry urge that the economic

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82. Ruben Mettler, the Chairman and Chief Executive Officer of TRW, Inc., noted recently:

> Few changes in the domestic American economy in the postwar period appear to me to be as significant and as inadequately recognized, particularly by national policy makers, as those changes — heavily influenced by technology — which increasingly bind the domestic economy to the rest of the world, and make it a more dependent subelement of a larger and more powerful economic system.
>
> These binding forces exert a discipline on national policy makers by creating significant conflicts between politics and policies which are popular domestically but incompatible with international reality. They force on business executives the recognition that many of their markets are worldwide in scope and that they must compete worldwide to survive in those markets.

"Technology: A Powerful Aspect for Change," in M. Feldstein, The American Economy in Transition (National Bureau of Economic Research: 1080) 598.

83. Only last week CBS signed a five-year, $10,000,000 agreement to supply an Italian Television network with hundreds of hours of news, sports and entertainment programming. Similar international arrangements are being formulated by ABC and the Cable News Network. See generally, Washington Post, Apr. 17, 1982, at D9.

84. Dept. of Commerce, 1981 U.S. INDUSTRIAL OUTLOOK, at 531.

effect is devastating.[85] Unless American products receive a high level of protection in user countries, our exports will be severely impaired by diminished foreign revenues.

The importance of protecting these expanding markets was further emphasized by U.S. Trade Representative William Brock in announcing the U.S. Government Work Program on Trade in Services. Specifically recognizing motion pictures and communications as elements of the "service sector" of our economy, Mr. Brock declared:

> Service trade is the frontier for expansion of export sales.
>
> Aggressive cultivation [of] foreign markets by U.S. service industries is as critical to our economic recovery as is increased export of goods. 86/

II. FOREIGN SYSTEMS COMPENSATING COPYRIGHT PROPRIETORS FOR HOME TAPING

The increasing availability of home taping equipment has raised copyright concerns throughout the industrialized world. Discussions and legislative proposals have been advanced in countries such as Norway,[87] Sweden,[88]

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85. It has been estimated that unauthorized duplication of movies was a $100,000,000 business last year. N.Y. Times, Oct. 25, 1981, at 7.

86. Press Release of the Office of the United States Trade Representative at 1 (April 20, 1981).

87. It has been reported that the Norwegian Parliament recently authorized the placing of a levy on equipment and blank cassettes. The Government had intended to implement the tax on equipment as of January 1, 1982, and that on blank cassettes as of July 1, 1982. See Report of the Committee of Experts on Legal Protection, (Council of Europe; October 6, 1981) (unpublished). Whether this time table has been met, however, is unclear at this time.

88. The Swedish Government has been reported to be considering placing a special levy on the sale of blank videotapes. The amount of the levy is expected to be around $7.30 for a three-hour tape. The levy is expected to yield an estimated $24,000,000 a year, a third of which will be distributed to copyright proprietors. VARIETY, March 24, 1982, at 91.

Denmark,[89] France,[90] and Japan.[91] At present, however, only two countries, West Germany and Austria, have adopted definitive systems for compensating copyright proprietors for material reproduced by home taping.

A. Federal Republic of Germany: 1965 Act.

Under the West German approach, copyright royalties are generated through the imposition of a levy on the recording equipment.[92]

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89. The question of home taping is presently being considered by a committee studying general revision of the Danish Copyright Act. It has been reported the committee presently favors a levy on blank cassettes. Supra, note 87.

90. In discussing French reforms in the broadcasting field, Prime Minister Pierre Mauroy revealed a home video levy was being considered by the French Government. Although details of the plan were not available, it is believed the levy could be applied to the video hardware, prerecorded tapes and disks, or blank tapes. VARIETY, March 10, 1982, at 35.

91. Supra, note 77 and associated text.

92. The operative language of Article 53(5) of the German Copyright Law establishing the system reads as follows:

> If from the nature of the work it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual or sound records, or by transferring from one visual or sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions. Any person who for commercial purposes introduces or reintroduces such equipment within the jurisdiction of this Act shall be jointly responsible with the manufacturer. This right shall not exist if, from all of the circumstances, it appears probable that the equipment will not be used within the jurisdiction of this Act for the said purposes. This right may only be enforced through collecting societies. By way of remuneration, each copyright owner shall be entitled to an equitable participation in the proceeds realized by the manufacturer from the sale of such equipment; the total claims of all copyright owners, including those coming within Articles 84 and 85, paragraph (3), and Article 94, paragraph (4), shall not exceed five percent of such proceeds.

The German law was enacted on September 9, 1965, in response to a lawsuit filed on behalf of a German collecting society against producers of tape recorders.[93] The German Supreme Court ruled that home taping of sound recordings was a copyright violation but denied damages against the producers of recording equipment. The collecting society then attempted to enforce the rights of authors in the private sector but found the practical legal difficulties insurmountable. The impasse led to the adoption of the levy on the recording hardware for the benefit of collecting societies representing creators.

Three collecting societies participate in the negotiation and collection of royalties for audio reproduction.[94] The amount of remuneration is determined by negotiation, although the statute stipulates that it is not to exceed 5 percent of the manufacturers' or importers' price. Recently, however, the Ministry of Justice published a draft bill which would remove this ceiling and make the amount of royalty a matter of negotiation between the parties concerned.[95] Proponents of removing the ceiling argue that the large sale of inexpensive audio cassette recorders has drastically reduced the amount of royalties generated by the levy.

While there is no question that Article 53(5) covers videorecorders as well as audio recorders, the Germans have not resolved the problem of how to administer the collection and distribution of the levy for videorecording.

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93. J. Reinbothe, Compensation for Private Taping Under Sec. 53(5) of the German Copyright Act, 12 IIC 36, 37-39 (1981).

94. Under the present distribution system, the society representing composers (GEMA) receives 42 percent, the society representing performing artists and producers of sound recordings (GVL) receives 42 percent, and the society representing writers (WORT) receives the remaining 16 percent. Id. at 43-44.

95. Supra, note 87.

5. Austrian Statute of 1980.

The Austrian law differs from the German law in that the levy is applied on blank tapes rather than on hardware. The Austrian law was enacted July 2, 1980, but the details of much of the system remain to be established. Like the German approach, the system utilizes collecting societies. The operative language of Article 42(5) establishes the system.[96/]

The system regarding audio reproduction went into effect on January 1, 1981.[97/] Under the distribution plan which was adopted, approximately 55% of the royalties is used by the government for social welfare programs, such as pension plans. The balance is distributed to various copyright owners and performers. Under the plan in effect in 1981, 60 percent of the distributed royalties went to music composers and lyricists, and 40 percent to artists and record companies.

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96. Article 42(5) of the Austrian copyright law provides:

> If a work that has been broadcast by radio or fixed on a commercially-manufactured sound or visual recording medium is expected, by reason of its nature, to be copied by fixation on a sound or visual medium for personal use, the author shall have a right to equitable compensation when unrecorded sound or visual recording media that are suitable for such copying, or other sound or visual recording media intended for that purpose (recording material), are distributed within the country substantiated evidence of such circumstances shall be sufficient. Running time in particular shall be taken into consideration in the calculation of the compensation. The compensation shall be given by the by way of trade for payment, except where the recording material is not used for such copies for personal use; person who first distributes the recording material within the country by way of trade for payment.

97. The rate of levy was at .8 Austrian schillings, which amounted to approximately five cents per hour of playing time. Although it had been estimated the levy would generate 10 million schillings ($630,000), actual receipts in 1981 were only 6 million schillings ($380,000). As a result of this shortfall, a revised levy of 1.50 schillings was put in place for 1982. BILLBOARD, Feb. 6, 1982, at 1.

The royalty on video cassettes does not take effect until July 1, 1982, and the details of the collection and distribution remain to be established. A new government agency entitled the Arbitration Office was created by the statute to administer the functioning of the system and resolve disputes.

PART FOUR: COMMERCIAL LENDING RIGHT FOR MOTION PICTURES AND SOUND RECORDINGS

I. BACKGROUND AND THE PROBLEM

A. Statutory Provisions

SEC. 5 of the Mathias Amendment (No. 1333) to S. 1758 would create a commercial lending (rental) right in motion pictures and other audiovisual works and sound recordings, by narrowing the scope of the present limitation of title 17 U.S.C., section 109(a) on the public distribution right.

Section 109(a) of the Copyright Act embodies the so-called "first sale" doctrine. Presently, where someone acquires ownership of a copy of a copyrighted work, that person is entitled to sell or otherwise dispose of the possession of the copy without the permission of the copyright owner. Thus, the first sale of a particular copy exhausts the right of the copyright owner to control the further public distribution (including rentals for commercial purposes) of that copy under the Copyright Act.

Where the copyright owner distributes copies by rental, lease or lending, and the "bailee" acquires only possession of the copy, existing paragraph (c) of section 109 modifies the "first-sale" doctrine and allows the copyright owner to exercise control over rentals, at least in non-criminal contexts.[98/]

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98. The first-sale doctrine has a significant impact in criminal infringement actions. Under the predecessor of section 109(a) in the former Copyright Act [Section 27 title 17 U.S.C., in effect on December 31, 1977], the courts generally held that the prosecution in motion picture infringement cases had to prove the absence of a first sale in order to establish criminal infringment.

Section 106 of the Copyright Act expressly grants a right (the right of public distribution) which is taken away by section 109(a) once the particular copy is sold by authority of the copyright owner, but is specifically left intact by section 109(c) if the person who obtains a copy does not acquire ownership thereof.

B. Videorecordings

Although the commercial lending right portion of the Mathias Amendment thus affects a different exclusive right and a different user activity than the off-air taping portion of the Amendment, both respond essentially to the same technological development: the videorecorder (VCR). Copyright owners naturally expected that the VCR would open up new markets for the sale of prerecorded cassettes, which could be played back on the VCR. A market for prerecorded video cassettes does exist, but revenues have been diluted by the impact of home taping off-air and by the rental market for videocassettes. Copyright owners who hoped to sell prerecorded videocassettes for $40-$60, have found that retailers have instead rented the prerecorded cassettes 20 or more times per cassette at rates of $5 or more; and retailers have kept the profits under the protection of the existing section 109(a) of the Copyright Act. Copyright owners also suspect that renters frequently make a copy for retention before returning the prerecorded cassette, thus displacing the purchase of a prerecorded cassette.

An estimated 5000 video specialty stores[99] now rent videocassettes from their movie "libraries." One chain store owner reports that the business was started two years ago with a capital investment which is equaled now by one month of weekend rentals.[100] The same owner boasts that these video stores constitute "a movie library.... We've become the movie theaters. People are coming to us."[101]

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[99] Washington Post, March 30, 1982, at B16.

Copyright owners have responded in different ways to these developments: some follow a rental only policy for a few months, and then allow sales; some add a surcharge to the sales price to retailers in an attempt to gain some compensation for the rentals that follow; some allow sales of certain titles and allow rental-only of other titles, at least for a prescribed time period; and one producer has attempted to follow a rental-only policy,[102] which was subsequently modified because of adverse retailer reaction.[103]

C. Audio Recordings

As the price of audio recordings increases, a rental market for musical recordings has also developed. To date the greater impact has been felt abroad, especially in Japan and Sweden,[104] but U.S. record producers contend that it is only a matter of time until the problem becomes serious here. On principle, they argue that sound recordings should be accorded a commercial lending right if motion pictures and other audiovisual works are granted that right.

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[100] Id.

[101] Id.

[102] N.Y. Times, December 11, 1981, at D1.

[103] RECORD WORLD, January 16, 1982, at 3, 35.

[104] Sweden's recording industry organization is suing a retailer for copyright infringement in an effort to halt his rental operation BILLBOARD, at 1, 60.

II. COPYRIGHT OFFICE POSITION

The Copyright Office supports the grant of a commercial lending right to owners of copyright in motion pictures and other audiovisual works and sound recordings. The owners of these works, and the authors and artists who participate in the creation of these works, should have the right under the copyright law to control the rental of copies for profit, and thus assure they will be compensated for this important new means of exploiting their creative properties. Commercial lending of copies is not new. The existence of a highly profitable mass market for commercial lending of motion pictures is new. Retailers, with no investment risk, are enjoying the profits that on principle should flow to creators of copyrighted works.

The first-sale doctrine is an important, fundamental principle of copyright law but it is not immutable. Enactment of the commercial lending right proposed in the Mathias Amendment would not affect the core of the first-sale doctrine. Consumers who purchase copies would have essentially the same right as under existing law: they could destroy the copy, retain it permanently, or dispose of it by gift. Public libraries could continue to lend audio or video recordings and make nominal charges to cover administrative costs. The new lending right of the Mathias Amendment applies only to rentals for commercial purposes.

Nor is there any reason to believe that copyright owners will adopt a sales-only policy and prohibit rentals. Since rentals are profitable they will continue — with the difference that copyright owners will be compensated fairly for the use of their property.

Talent unions are also affected by the lost income from rentals of videocassettes. In testimony before the Senate last year, Stephen Roberts of Twentieth Century-Fox Telecommunications stated that members of creative guilds and unions receive 12.4 percent of the gross royalty for videocassette sales.[105] Guild and union members receive nothing from rental income that flows only to retailers.

Accurate data concerning rental income is not available. The trade press reports that many videocassettes are rented 20 or more times each; more popular titles may be rented 80-100 times, at enormous profit to the retailer.

The Copyright Office believes creative authors and artists and copyright owners should share in this rental income. Equity demands this sharing of income even if sales of videocassettes should remain strong. But, there is also reason to believe that rental practices have a direct adverse impact on the market for videocassette sales. The person who rents will usually not buy the prerecorded tape; at least some renters make their own tape or tapes (one for himself or herself, and one for the friend who made the second VCR available for the taping). While the latter practice is difficult to curtail (except by technological devices that might inhibit copying), the copyright owner should at least be compensated for the rental itself.

In this statement, the Copyright Office has emphasized the plight of video producers who are unfairly shut out of the rental market. The Mathias Amendment also covers commercial lending of sound recordings,

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105. Statement of Stephen Roberts, before the Senate Committee on the Judiciary, July 29, 1981, at 3.

and the Copyright Office supports inclusion of sound recordings in the commercial lending right. Commercial rental of sound recordings has not yet emerged as a major problem in the United States. However, the practice of renting sound recordings is growing in foreign countries,[106] and it is reasonable to expect that the practice will develop here as the sales price of sound recordings reaches a point in comparison to the cost of rental that would lead to the creation of a rental market.

In conclusion, the Copyright Office supports enactment of the commercial lending right for audiovisual works and sound recordings, as set forth in SEC. 5 of the Mathias Amendment to S. 1758. The first-sale doctrine was never intended to encourage growth of a second-hand rental market that may eventually replace sales of videocassettes. The doctrine was intended primarily to benefit the ultimate consumer who purchased a copy of a copyrighted work. That consumer will not be adversely affected by establishment of a commercial lending right for audiovisual works and sound recordings. Rentals will continue; the consumer will have a choice between purchase and rental. The difference is that copyright owners will be permitted to participate in the commercial values, in a new market, which their authorship has created.

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106. See, Fujita, Japan's Rental Shops Spark Controversy, BILLBOARD, August 15, 1981, at 1.

CONCLUSION

From its early beginnings, the purpose of copyright has been to further cultural development by protecting authors' economic incentives to create new intellectual works. The copyright law seeks to assure that authors reap royalties from the use of their works, and to protect industries who invest resources in bringing authors' works to the public.

New technology should not alter these basic objectives. Rather, because it generally enables easier and faster copying and distribution of creative intellectual and artistic works, it likewise intensifies the need to extend the protection afforded by copyright to embrace these new uses of works of authorship.

No one wishes to inhibit new technologies, nor their enjoyment by the public. Likewise, no one wishes to diminish the incentive of copyright, vindicated by time and experience, and in America especially, by success.

New technologies, such as videorecorders and audio recorders, raise new challenges to the ability of copyright to protect intellectual property. But, in the words of Canadian copyright expert, A.A. Keyes,

> Surely, it cannot be the case that technology is to be permitted to change but that copyright should be frozen at a particular point in time as representing the limits of permitted rights. Just as technology changes over time there should be corresponding changes in copyright to ensure the even application of the principles of copyright. 107/

Senator Mathias echoed these sentiments in introducing his home videorecording amendment:

> . . . If patents and copyrights serve the great interests of society, failing to protect the rights

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107. A.A. Keyes, "A Copyright Perspective on Broadcasting, Cable Transmissions and Satellites" (unpublished paper 1981).

> created by such instruments is not excused by the fact that new technologies have made the protection of those rights more difficult. The very ingenuity of our age that has produced these remarkable technologies should be able to devise the laws to accommodate them. 108/

My purpose in this statement has been to discuss the issue of off-air videotaping of commercial television broadcasts and audiotaping for private use in the broader context of traditional copyright principles; to assemble the available documentary evidence on legislative history and the economic effects of home taping on copyright proprietors; and to consider foreign experience with legislation designed to remunerate copyright holders for such taping.

The Copyright Office has concluded that the proposed Mathias Amendment offers a reasonable and expedient solution to these issues. In offering a system for remunerating copyright owners for private off-air videotaping and audiotaping, the proposal extends the Ninth Circuit's Betamax holding beyond particular litigants to the entire class of similarly affected copyright owners. Moreover, the Amendment achieves that end without impinging upon home privacy, without unnecessarily burdening consumers, and without impeding hardware development.

I hope this statement will provide the Committee with information useful to it in considering the off-air videotaping and home audiotaping proposals, and the commercial lending right proposal. The Copyright Office stands ready to assist you in any other way possible.

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108. 127 Cong. Rec. S 15723-24 (daily ed. Dec. 16, 1981) (remarks of Senator Mathias).

APPENDIX I

UNIVERSAL CITY STUDIOS V. SONY CORP. OF AMERICA

* * *

KILKENNY, Circuit Judge:

Appellants, Universal City Studios, Inc. (Universal) and Walt Disney Productions (Disney), producers and copyright owners of audiovisual materials, some of which they choose to telecast over the public airwaves, brought this copyright infringement claim against Sony Corporation (Sony), the manufacturer of the Betamax, a videotape recorder (VTR), and Betamax tapes, Sony Corporation of America (Sonam) (the American distributor of the Betamax), four retail establishments that sell the Betamax, Doyle Dane Bernbach, Inc. (DDBI) (the advertising agency retained by Sonam to promote the Betamax), and one individual (William Griffiths), who is an owner and user of the Betamax.

Appellants argue that home video recording of their copyrighted works constitutes copyright infringement and that the corporate defendants are liable as direct, contributory and/or vicarious infringers. Additionally, appellants contend that the retail defendants violated the copyright laws when they recorded portions of appellants' programs to demonstrate the Betamax to a prospective purchaser. Likewise, appellants presented additional claims arising under state law and sought broad injunctive relief, as well as profits and damages. The district court, after three years of litigation and a five week nonjury trial, in the reported case of *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. 429 (C.D.Cal.1979), entered judgment for appellees and held:

(1) that copyright holders of audiovisual materials, some of which are sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of a videotape recorder in their homes for private, non-commercial use;

(2) the retailer did not infringe upon the copyrights where it did not compete with nor profit from materials and intended only to demonstrate the recorder;

(3) even if home-use copyrighting constituted an infringement, neither manufacturers, distributors, retailers, nor advertisers were liable under theories of direct or contributory infringement, or vicarious liability;

(4) that even if the appellees were deemed liable, injunctive relief was not available where they did not unfairly compete with owners of copyrighted materials nor interfere with their advantageous business relations.

FACTUAL BACKGROUND

The district court in its elaborate, painstaking, and thoughtful opinion, *Universal City Studios v. Sony Corp. of America, supra*, at 432, 442, carefully outlined the facts and the parties' contentions. In our view it would be a complete waste of judicial time and effort and of no benefit to the Bench or Bar to here repeat those facts and contentions.

ISSUES

I. Does off-the-air copying of copyrighted audiovisual materials by owners of a videotape recorder in their homes for private noncommercial use constitute an infringement?

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* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

II. Are the corporate appellees liable for infringement under any of the theories advanced?

III. If appellants are entitled to prevail, the nature of the relief to be granted.

IV. Retail store use of the copyrighted material.

V. Unfair competition claims under 15 U.S.C. § 1125(a) and state law.

I.

Our comments under this issue include:

(a) whether the district court committed error in finding an implied video recording exception in the applicable legislation, and

(b) whether home video recording constitutes fair use.

Article I, § 8, cl. 8 of the United States Constitution empowers the Congress: "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." In commenting on this clause of the Constitution, our Supreme Court has said that "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954). Despite what is said in some of the authorities that the author's interest in securing an economic reward for his labors is "a secondary consideration," it is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and that this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright scheme. This scheme relies on the author to promote the progress of science by permitting him to control the cost of and access to his novelty. It is based on the premise that the exclusive right granted by the copyright laws "will not impose unacceptable costs to society in terms of limiting access to published works or pricing them too high." The district court relied heavily on its conclusion that the Copyright Act of 1976, providing that copyright holders have monopoly power over all productions of their works, did not include reproduction of sound recordings for home use. See 17 U.S.C. §§ 106(1), (4), (5) and 107. In arriving at this conclusion, the court compared the Copyright Act of 1909, which created the fair-use doctrine to immunize some forms of copying from the literal implications of the Act. 17 U.S.C. (1970 Ed.) § 1 with the language of 17 U.S.C. § 106 of the New Act which provides:

> "Subject to sections 107 through 118, the *owner of copyright under this title has the exclusive rights to do and to authorize any of the following*:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture of other audiovisual work, to display the copyrighted work publicly." [Emphasis added.]

"The approach of the [statute] is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made 'subject to sections 107 through 118,' and must be read in conjunction with those provisions." H.R. No. 94-1476, p. 61 Sept. 3, 1976, reprinted 1976 U.S.Code Cong. & Admin.News, 5659 at 5674, 94th Congress, 2d Sess.

The statutory framework is unambiguous; the grant of exclusive rights is only limited by the statutory exceptions. Elementary principles of statutory construction would indicate that the judiciary should not disturb this carefully constructed statutory scheme in the absence of compelling reasons to do so. That is, we should not, absent a clear direction from Congress, disrupt this framework by carving out exceptions to the broad grant of rights apart from those in the statute itself. It is the duty of the courts to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question. *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976); *Commissioner v. Bilder*, 369 U.S. 499, 82 S.Ct. 881, 8 L.Ed.2d 65 (1962); *Church of Scientology of California v. U. S. Dept. of Justice*, 612 F.2d 417 (C.A.9 1979).

Our study of the record and analysis of the legislation convinces us that the district court inadvertently bypassed the statutory framework of the 1976 legislation and, in particular, § 106 of the new Act. In commenting on the "broad language" of the new Act, the district court expressed the belief that despite the monopoly power over all reproductions of their works granted by § 106, nonetheless, the legislative history indicated to the contrary. We quote from its opinion:

> "The broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works. Legislative history, however, shows that Congress did not intend this broad statement to include reproductions of sound recordings for home use. The central question here is whether Congress intended the same language to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use. Legislative history does not show this intent." 480 F.Supp. at 443.

By characterizing its task as a search for whether Congress intended to afford protection, the district court misapprehended the scope of the relevant inquiry. The issue is not whether Congress exhibited an intent to protect a copyright holder from certain reproduction of his works. It had already expressed its intent to do so by extending the "bundle of rights" set forth in § 106 to copyright owners, *subject to specific sections*, to-wit: §§ 107–118. Consequently, our concern must be whether Congress has exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107–118. When one analyzes whether there exists an implied home video recording exception, apart from the fair use doctrine, in the light of the statutory framework, it is manifest that the district court's conclusion was erroneous. While the sound recording situation is analogous, there are a number of reasons why sound recordings should receive different judicial treatment.[1] The difference between these two approaches—did Congress intend to afford protection or did Congress intend to withdraw protection—is more than a matter of semantics.[2]

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[1] The district court's reasoning has been subject to a number of criticisms. Note, *Universal City Studios, Inc. v. Sony Corp.: 'Fair Use' Looks Different on Videotape*, 66 Va.L.Rev. 1005, 1011–12 (1980). Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 Stan.L.Rev. 243, 247 n. 18 (1979); 8 N.Y.U.Rev.L. & Soc. Change, 45, 48–51, 1978–79; Note, Copyright—The Home Video Recording Controversy, 81 W.Va.L.Rev. 231, 245–247 (1979).

[2] Most of the commentators have found problems with the reasoning underlying the district court's conclusion. 3 *Nimmer on Copyright*, § 13.05[F][5] at 13–95–96, n. 159 (1981); *Universal City Studios, Inc. v. Sony Corp.: 'Fair Use' Looks Different on Videotape*, 66 Va.L.Rev. 1005, 1011–12 (1980); Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 Stan.L.Rev. 243, 247, n. 18 (1979); 8 N.Y.U.Rev.L. &

First, the copyright statute treats sound recording and audiovisual works as separate categories of protected materials.[3] And Congress has shown "special solicitude for audiovisual works."[4] For example, audiovisual materials are specifically excluded from some exemptions by the 1976 Act. 17 U.S.C. §§ 108(h), 110(*l*), 112(a). Section 108 provides strong support for the conclusion that Congress was concerned about unauthorized reproduction of audiovisual works, whether or not such reproductions were for profit. Section 108(h) excludes audiovisual works other than an audiovisual work dealing with the news from the limited exception provided by § 108. The House Report dealing with § 108(h) indicates that the doctrine of fair use may have a limited application to the reproduction of such works. House Report at 1976 U.S.Code Cong. & Admin.News at 5692. In addition, even as to audiovisual news programs, which are subject to the § 108 exemption, the H.R. notes, in regard to § 108(f)(3), that:

> "It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. As such, it is an adjunct to the American Television and Radio Archive established in Section 113 of the Act which will be the principal repository for television broadcast material, including news broadcasts. The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause." 1976 U.S.Code Cong. & Admin.News at 5690–91.

In light of this caution with respect to the limited § 108 exemption, it is clear that Congress did not intend to create a blanket exemption for home video recording, even when the recording is not for a commercial purpose.

Second, much of the underlying rationale for the recognition of an exemption for the home recording of sound recordings is simply not applicable to videorecording. Congress, when it granted limited copyright protection to sound recordings for the first time in 1971, made it clear in the legislative history that:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. *This practice is common and unrestrained today*, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." [Emphasis added.] U.S. Code Cong. & Admin.News 1971, 1566 at 1572.[5]

Soc. Change 45, 48–51 (1978–79); Note, Copyright—The Home Video Recording Controversy, 81 W.Va.L.Rev. 231, 245–47 (1979); Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L.Rev. 49, 61–67 (1981).

[3] 17 U.S.C. § 102 lists seven illustrative categories of "works of authorship" which are copyrightable. Section 102(a)(6) is "motion pictures and other audiovisual works" and § 102(a)(7) is "sound recordings."

[4] This reflects, no doubt, the relatively large economic investment involved in the creation of audiovisual works and the especial danger posed by unauthorized reproductions. *See* Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L.Rev. 49, 64–66 (1981).

[5] This language was not repeated in the legislative history accompanying the 1976 Act. The district court did not find this significant. Nimmer has commented that:

> "This conclusion seems questionable on several grounds. First, the failure to repeat in the Committee Reports for the current Act an intention to recognize the home recording exemption referred to in the House Report for the 1971 Amendment is at least as con-

Beyond question that statement was not intended to apply equally to home video recording.[6] Perhaps most importantly, Congress simply was not addressing the problem of home video recording. Certainly in 1971, home video recording did not present Congress with a "common and unrestrained practice" developed in a period when copyright protection was wholly lacking.[7]

There is no clear legislative language indicating that home video recording is not within the exclusive rights granted by § 106. The statute itself and the House and Senate Reports accompanying the 1976 Act do not provide for a broad based home use exception. There was never a considered review of the home video recording problem. The statements supporting the district court's conclusion [8] hardly represent—when considered in the context in which they were made and in the context of the 20 year copyright revision process—a firm expression of Congressional intent to carve out a major exception to the copyright scheme.

The legislative history of the 1971 Amendment, heavily relied upon by the district court as disclosed by its opinion, 480 F.Supp. pages 444 and 445, is entirely beside the point. It is clear that the history relied upon, H.R. No. 487, 92d Cong., 1st Sess. 7, Reprinted [1971] U.S.Code Cong. & Admin.News, pages 1566, 1572, was not intended to apply equally to video home recording. We have emphasized this point in our footnote 6. Above all, it must be recognized that the Congress was in no way addressing the problem of video recording in its discussion of the 1971 legislation. Consequently, the analogy the district court attempted to draw between that legislation and the Act of 1976 is simply without foundation. There is absolutely nothing in the 1971 legislation which would indicate that the Congress was in any way concerning itself with home video recording. It is well settled that silence cannot be viewed as an expression of Congressional intent. *Turpin v. Mailet*, 579 F.2d 152 (C.A.2 1978), vacated, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645, 591 F.2d 426 (C.A.2 1979). Beyond that, where the meaning of a statute is clear and unambiguous, it would be highly improper to construe inconclusive legisla-

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sistent with an altered intention upon the part of the Congress enacting the Act of 1976. This is particularly true in view of the fact that other passages from the House Report for the 1971 Amendment were incorporated verbatim in the House Report for the current Act. ... There is further the fact that the Amendment of 1971 was itself legislation limited to the creation of copyright in sound recordings, and did not (in this context) purport to affect the copyright in musical or other works which may be contained in such sound recordings. Therefore, the home recording exemption referred to in the House Report for the 1971 Amendment could only be applicable to the sound recording copyright, not to the copyright in any underlying work contained therein.... Finally, it is to be noted that the House Report for the current Act states that 'It is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.' H.Rep., p. 66." 3 Nimmer, *supra*, § 13.05[F][5] at 13–96, n. 159.

[6] The House Report to the 1971 Sound Recording Act carefully excluded sounds accompanying motion pictures from the scope of that particular piece of legislation.

"In excluding the 'sounds accompanying a motion picture' from the scope of this legislation the Committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the Committee's opinion that soundtracks or audio tracks are an integral part of the 'motion pictures' already accorded protection under subsections (*l*) and (m) of Section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture...." 1971 U.S.Code Cong. & Admin.News at 1570–71.

[7] Motion pictures had been protected by the copyright laws since 1912.

[8] See 480 F.Supp. at 445–46. The statements of Barbara Ringer and Representative Kastenmeier were made extemporaneously at a committee hearing and on the House floor respectively, and they were in connection with the Sound Recording Act of 1971. The statements do not represent a considered review of the home videorecording problem, and even these statements do not clearly establish an intent to exempt unauthorized reproductions *apart from the fair use doctrine.*

tive history so as to apply a statute in a manner inconsistent with its claimed meaning. *United States v. Wilson*, 591 F.2d 546 (C.A.9 1979).

Resort to the legislative history of an Act is entirely unnecessary when the statute is clear and unequivocal on its face. *United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961), rehearing denied 368 U.S. 870, 82 S.Ct. 24, 7 L.Ed.2d 70. The legislative history of a statute is not relevant when the terms of the statute are clear and unambiguous. *Natural Resources Defense Council, Inc. v. U. S. Environmental Protection Agency*, 507 F.2d 905 (C.A.9 1974).

[1] On this issue, we conclude that off-the-air copying of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use, constitutes an infringement of appellants' copyrighted audiovisual materials.

FAIR USE DOCTRINE

As indicated by the district court, the analysis of whether the recording was infringement does not end with the statutory language. While the old Act was in effect, the courts pronounced a rule of law known as the doctrine of "Fair Use." This doctrine has been appropriately described as "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (C.A.2 1939). From its inception, the doctrine has presented members of the judiciary with among the most elusive views that the courts are called upon to decide. It has been said that the doctrine is entirely equitable and is so flexible as virtually to defy definition. *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y.1968). Time after time the courts have ruled on the Fair Use doctrine, but no real definition of the concept has ever emerged. One of the better definitions is that of the Second Circuit in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (C.A.2 1966), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967), where it is said that fair use is "a privilege in others than the owners of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner" by the copyright. The Congress in the legislation of 1976 attempted to define fair use in § 107 which reads:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

It is noteworthy that the legislative history of § 107 makes it clear that its statements of the fair use doctrine offer some guidance to users in determining when the principles of the doctrine apply. However, it is there emphasized that the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules.

The history states that the legislation endorses the purposes and general scope of the *judicial doctrine* of fair use, but there is no disposition to freeze the doctrine in the statute. We quote from the closing sentence of the history:

> "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any

way." U.S.Code Cong. & Admin.News 1976, 5680.

Consequently, and despite what is said by the district court, this fair use analysis is equally applicable to alleged violations under both the Old and the New Act. It is interesting to note that appellees have not suggested that home video recording would not violate the Old Act in the absence of a finding of fair use.

Despite the nebulous character of the doctrine, previous case law and the general copyright scheme do provide us with considerable guidance. As the first sentence of § 107 indicates, fair use has traditionally involved what might be termed the "productive use" of copyrighted material. See 66 Va.L.Rev. at 1012–1014. The purposes listed in § 107 are simply illustrative and not limitative, but they do give some idea of the general orientation of the doctrine. It is noteworthy that the statute does not list "convenience" or "entertainment" or "increased access" as purposes within the general scope of fair use.

Leon Seltzer, in his illuminating book *Exemptions and Fair Use in Copyright* (1978) states:

> "The list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: *it has always had to do with the use by a second author of a first author's work.* Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the 'ordinary' use of it. When copies are made for the work's 'ordinary' purposes, ordinary *infringement* has customarily been triggered, not notions of fair use." *Id.* at 24. [Emphasis in original.]

The cases have, for the most part, adhered to this aspect of the fair use doctrine. If an alleged infringer has reproduced a copyrighted work to use it for its intrinsic purpose, fair use has not generally been applied. Nimmer notes, however, that the courts have not adhered to this notion in recent years, and cites two cases as authority—*Williams & Wilkins Co. v. United States,* 487 F.2d 1345 (Ct.Cl.1973), *aff'd by an equally divided court,* 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975), and the district court's opinion in this case. *Nimmer, supra,* § 13.05[A][1] at 13–58 n. 23.3. *Williams & Wilkins Co.,* which has been appropriately regarded as the "Dred Scott decision of copyright law", 487 F.2d at 1387 (Nichols, J., dissenting), is clearly not binding in this circuit, and, in any event, we find its underlying rationale singularly unpersuasive. The district court, while noting that *Williams & Wilkins Co.* "has little precedential value," 480 F.Supp. at 450, and quoting Nimmer's critique of the opinion, *Id.* at 451, used *Williams & Wilkins Co.'s distortions of the fair use rationale to justify an application of the doctrine which, in our opinion, stretches fair use beyond recognition and undermines our traditional reliance on the economic incentives provided to authors by the copyright scheme.*

In *Williams & Wilkins Co.,* the Court of Claims found that copying by the National Institute of Health (NIH) and the National Library of Medicine (NLM) of entire articles published in plaintiff's journals was fair use. Plaintiff was the publisher of certain medical and scientific journals. The libraries regularly filled requests for journal articles (including some in plaintiff's journals) by photocopying such articles. Under this system, the libraries copied approximately 200,000 articles a year. The majority identified the core of its fair use finding:

> "First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringement; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before con-

> gressional action is forthcoming, place such a risk of harm upon science and medicine." 487 F.2d at 1354.

We believe that *Williams & Wilkins Co.* is clearly distinguishable. It appears that the Court of Claims was primarily concerned about the serious damage to medical science that would result if it held for the plaintiff. In this case, there is no corresponding countervailing societal benefit to "weigh" against the copyright interests of the author. We do not mean to suggest that increased access to such Disney products as "Chip and Dale/Mixed Nuts" is not a benefit to society. We only mean to say that the consequences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in *Williams & Wilkins Co.*

Aside from the obvious distinctions between *Williams & Wilkins Co.* and the instant case, we believe that the Court of Claims' approach—in treating intrinsic use of such work as within the bounds of fair use—created doctrinal confusion that raises the spectre of the evisceration of the traditional workings of the copyright scheme. As Seltzer has stated:

> "The traditional fair use notion has had to do with the sort of access that the mind of a user has to a copyrighted work: the work is instantly accessible on sight or hearing, and the question is what the second user would or should be allowed to 'do' with it—or, more accurately, what the creator of the work ought to have expected him freely to do with it. Use for photocopying and phonorecording involves a different sort of access: the possibility—and the capability—of instant reproduction of the work in the same mode and for the same purpose the original was in the first place acquired. With the first sort of access and use we can deal under notions of fair use, even when it involves photocopying, for appropriate expectations of economic reward are essentially unchanged. *The second kind of access and use triggers questions of reallocation of costs, however, and insofar as a use is of that sort, it is appropriately dealt with as an exemption from the normal workings of the copyright scheme,* . . ." Seltzer, *supra*, at 37–38. [Emphasis added.]

Seltzer concludes that exemptions from the normal workings of the copyright scheme, because they involve the reallocation of costs, are matters for Congress, not the courts.

We hold that, particularly in the context of new technology, there is a danger to including the sort of copying involved in *Williams & Wilkins Co.* within the scope of the fair use doctrine. New technology, which makes possible the mass reproduction of copyrighted material (effectively taking control of access from the author), places a strain upon the fair use doctrine. A court, if it decides that fair use is applicable, is required to weigh—in "balancing the equities"—the "benefit" of an extremely popular increase in access with the "harm" to a plaintiff. The harm to a copyright plaintiff is inherently speculative, and as *Williams & Wilkins Co.* and the district court decision indicate, a plaintiff is faced with the unenviable task of proving the nonexistence of fair use, which has typically been viewed as a *defense.*

The costs are also important. They fall primarily into two categories. First, the result of applying fair use to intrinsic use cases like *Williams & Wilkins Co.* and this case is a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use. Second, the framework for copyright litigation this view establishes is ultimately hostile and extremely adverse to the rights of copyright holders. It places them in the unenviable position of proving damage in a context in which extreme difficulty is acknowledged.

As a society, we may decide that these costs are acceptable. But, that branch of public policy determination is preeminently a decision for the legislative branch.

[2] It is our conviction that the fair use doctrine does not sanction home videorecording. Without a "productive use", *i. e.*

when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use. An analysis of the four factors listed in § 107 does not dictate a contrary result.

A consideration of the first factor—"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"—does not aid appellees' case. The district court noted that "Courts have traditionally applied this factor by asking whether the copyrighted material is used for criticism, research or other independent work." 480 F.Supp. at 453. The fact that the use involved does not further a traditionally accepted purpose clearly weighs against a finding of fair use. The district court, however, emphasized the noncommercial[9] and home use of the copyrighted material. The statute does not, however, draw a simple commercial/noncommercial distinction. The statute contrasts commercial and nonprofit educational purposes, and there is no question that the copying of entertainment works for convenience does not fall within the latter category. The fact that the "infringing" activity takes places in the homes does not warrant a blanket exemption from any *liability*. It seems more appropriate to address the privacy concerns raised by the district court in fashioning the appropriate relief. The suggestion that First Amendment concerns support the purpose of Betamax users to increase the access to copyrighted materials is wholly without merit. "The first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (C.A.5 1979); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 759 (C.A.9 1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1160–1171 (C.A.9 1977).

The second factor—"the nature of the copyrighted work"—does not support a finding of fair use. The legislative history and the case law dealing with this factor are rather sparse, but there seems to be some indication that the scope of fair use is greater when informational type works, as opposed to more creative products, are involved. Seltzer, *supra*, at 33–34; Nimmer, *supra*, § 13.05[A][2] at 13–61. The courts inquire whether the nature of the material is such that additional access "would serve the public interest in the free dissemination of information." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307; *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y.1968). If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted.[10] The district court, however, found it significant that "This case involves only that copyrighted material which plaintiffs voluntarily choose to have telecast over public airwaves to individual homes free of charge." 480 F.Supp. at 453. We fail to see how the method by which appellants have chosen to distribute their works is relevant to this factor of the fair use analysis. We are in substantial agreement with one commentator's discussion of the district court's analysis on this issue:

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[9] "[C]ommercial use tends to cut against a fair use defense." *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1175 (C.A.5 1980) (footnote omitted). Noncommercial motive does not mean fair use. 66 Va.L.Rev. at 1017; Marsh, *supra*, at 68–71. The "noncommercial" characterization of home videorecording is a bit misleading. The corporate defendants involved in the lawsuit are obviously not in the business of promoting home videorecording for strictly altruistic reasons.

[10] *Rohauer v. Killiam Shows, Inc.*, 379 F.Supp. 723, 733 (S.D.N.Y.1974), *rev'd on other grounds*, 551 F.2d 484 (C.A.2 1977), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 ("There is no discernible public interest in the dissemination of 'The Son of the Sheik' sufficient to justify the infringement. . . . It can scarcely be argued here that the enduring fame of Rudolph Valentino or the intrinsic literary and historical merit of 'The Son of the Shiek' (whatever it may be) serves any public interest sufficient to endow these defendants with the privilege of fair use."); *Loew's Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165, 173 (S.D.Cal.1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (C.A.9 1956), *aff'd by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958).

> "While this attribute of the broadcast industry complicates the economic harm analysis, it has no bearing on society's interest in the dissemination of the material or the author's reasonable expectation of compensation for repeated use of his material. These issues, basic to the rationale of the fair use doctrine, implicate the intrinsic qualities of the work, not the medium of its presentation. The *Sony* court's analysis obfuscated the real issue at stake: whether the public interest in promoting the development of art and science dictates disregarding a copyright holder's interest in controlling the use of his product. In *Sony*, the copyright owner's interest should have taken precedence." 66 Va.L.Rev. at 1020–21.

The third factor—"the amount and substantiality of the portions used in relation to the copyrighted work as a whole"—clearly weighs against a finding of fair use. The district court acknowledged that "Home use recording off-the-air usually involves copying the entire work," 480 F.Supp. at 454, and that this typically precludes a finding of fair use. The court concluded, however, that the courts have *only* been concerned about the "substantiality" of the copying when it produced harm, and that "this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for 'plaintiff's original work.'" *Id.* We believe that this view of the case law is completely wrong.

In *Walt Disney Productions v. Air Pirates, supra*, we stated "While other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, this and other courts have accepted the traditional American rule that excessive copying precludes fair use." *Id.* at 758. In addition, the district court in *Loew's Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D.Cal.1955), stated "The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial." *Id.* at 184. A panel of this court later affirmed *Benny v. Loew's, Inc.*, 239 F.2d 532 (C.A.9 1956), and specifically noted that "The judgment is affirmed upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of [the district judge]." *Id.* at 537. These cases clearly did not limit their discussion of "substantiality" to cases in which the plaintiff had been harmed. It seems clear that these cases are based, in part, on the notion that copyright is a property interest and that it is impermissible, in the vast majority of cases, to "appropriate" the copyrighted material without the owner's consent. The copyright laws afford the author the right to control access to his work, and, absent compelling justifications, this right should not be abridged.

We need not rest our holding on the applicability of the "substantiality" discussion in *Air Pirates* and *Loew's* to the home videorecording context, but it seems clear that this factor in the fair use calculus weighs heavily in appellants' favor.

The fourth factor—"the effect of the use upon the potential market for or value of the copyrighted work"—does not support a contrary result. In light of the preceding discussion, we do not believe that it is necessary to address the harm issue with respect to the liability question. We feel compelled, however, to express our disagreement with the district court's approach on this issue.

First, it seems apparent that the district court was much too strict in requiring appellants to establish its degree of harm.[11]

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[11] The courts typically state that irreparable harm is presumed. *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243, 247, 251 (W.D.N.Y.1978). The presumption noted in *Crooks* was not because of the procedural posture (motion for preliminary injunction). The court noted that, at trial, the defendant would have an opportunity to rebut the presumption. In our case, it is clear that appel-

Our sentiments are the same as those of one of the dissenters in *Williams & Wilkins Co.* who stated, "Although the court states that it rejects the trial determinations as to both actual and potential damage to plaintiff, I think the opinion shows that the court's conclusion is based primarily on its finding that *plaintiff failed to prove actual damages.*" 487 F.2d at 1367 (Cowen, C. J., dissenting). [Emphasis added.] That is simply too great a burden to impose on copyright plaintiffs. Nimmer has suggested that "the central question in the determination of fair use is whether the infringing work *tends* to diminish or prejudice the potential sale of plaintiff's work." 3 Nimmer, *supra*, § 13.05[E][4][c] at 13–84. [Emphasis added] [Footnote omitted.] [12] Under this sort of standard, it seems clear that appellants should have prevailed. Since the copies made by home videorecording are used for the same purpose as the original, a finding of fair use is not justified.[13] The district court seems to recognize, on several occasions, that appellants will have to take affirmative steps to compete with the appropriated versions of their work. That such competition is necessary supports appellants' allegations of harm; at the least, it makes clear that the "infringing" activity *tends* to prejudice the potential sale of appellants' work. It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market.

Second, we do not believe that the district court paid sufficient attention to the fact that it is extremely difficult for a copyright plaintiff to prove harm from the activities of specific defendants. 3 Nimmer, supra, § 13.05[E][4][c]. As Nimmer states, "Far from this justifying a defense of fair use, failure to prove damages will in the usual case give rise to a minimum statutory damages liability. It is only when the general dissemination of an allegedly infringing work by all potential defendants, and without limitation as to the number of reproductions, and volume of users would still not adversely affect the plaintiff's potential market that a conclusion of fair use may be justified." *Id.* at 13–84.[14] The district court quoted, in what seemed to be an approving manner, similar sentiments from one of Nimmer's law review articles, but the court clearly did not use this rationale in deciding the fair use question. The court, in analyzing the fourth fair use factor, did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders. It seems clear that absent an inquiry which takes into consideration the full scope of the "infringing" practice, copyright plaintiffs, in cases of this sort, would face insuperable obstacles to the protection of their rights. And, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the *potential* market for appellants' works.

II.

LIABILITY OF CORPORATE DEFENDANTS

[3, 4] We disagree with the district court's conclusion that even if it were to hold that home-use copying was an infringement under the Old and the New Acts and was not fair use, the court could not find the appellees Sonam, Sony, DDBI and the four retail stores liable for this type of infringement. 480 F.Supp. at 457.

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lees did not establish with any degree of certainty that such harm was not likely to occur.

[12] The Second Circuit has used this approach. *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (C.A.2 1977).

[13] Put another way, because the copies serve the same function as the original, the "functional test" suggests that fair use is not available. 3 Nimmer, *supra*, § 13.05[B]; *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F.Supp. 351 (N.D.Ga.1979).

[14] Senate Report 94–473 seems to express a somewhat similar concern about mass proliferation of minor infringements: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Id.* at 65.

At the outset, it is necessary to make a couple of observations about the district court's analysis. The court relied heavily on a "staple item of commerce" [15] theory in rejecting appellants' claims. The district court stated that "Selling of a staple article of commerce—*e. g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management." 480 F.Supp. at 461. This reliance on the "staple article of commerce" theory was inappropriate. Appellees' analogy of videotape records to cameras or photocopying machines may have substantial benefit for some purposes, but does not even remotely raise copyright problems. Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material.[16] Therefore, videotape recorders are not "suitable for substantial noninfringing use." See 3 Nimmer *supra*, § 12.04[A] at 12-39, 12-40. That some copyright owners choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs.

A second observation about the district court's analysis is in order. The court found that the corporate appellees' knowledge was insufficient to make them contributory infringers. This was based, in part, on the court's assertion that "defendants here could not know what copyright law required. Before this lawsuit, that issue had not been determined." 480 F.Supp. at 460. It is not necessary that an alleged contributory infringer have actual knowledge that activity which he *makes possible* constitutes a copyright infringement. A copyright defendant's "innocence" does not absolve him of liability; it only affects the remedies available.[17] For example, the statute provides for a *reduction* of statutory damages if the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," 17 U.S.C. § 504(c)(2), and a *remission* of statutory damages, *in limited circumstances*, if the "infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use." *Id.* In this context, a defendant's mistake as to the legal consequences of his actions does not constitute an excuse for an infringement. It is only necessary that a copyright defendant have knowledge of the infringing *activity*. It cannot be argued that the corporate appellees cannot be held to have the knowledge that the Betamax will be used to reproduce copyrighted material, some of which appellants own. We adopt the district court's definition: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (C.A.2 1971) (footnote omitted). There can be no doubt that the corporate appellees meet this definition.

First, the knowledge element is clearly satisfied. The corporate appellees "know" that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's consumer appeal. The record establishes that appellees knew and expected that Betamax's major use would be to record copyrighted programs off-the-air. Second, there is no doubt that appellees have met the other requirements for contributory infringement —inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable. *See generally* 66 Va.L.Rev. at 1021–24; 31 Stan.L.Rev. at 257–260; 52 S.Cal.L.Rev. at 601–607; 81 W.Va.L.Rev. at 247–49.

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[15] *See* 35 U.S.C. § 271(c) (defining contributory infringement in patent context and providing for exception for "a staple article or commodity of commerce suitable for substantial noninfringing use"); *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 488-89, 84 S.Ct. 1526, 1533-34, 12 L.Ed.2d 457 (1964).

[16] For examples, see Nimmer, *supra*, § 12.04[A] at 12-39-40.

[17] 3 Nimmer, *supra*, § 13.08. This discussion of "liability" obviously only pertains to civil, not criminal, liability.

III.

RELIEF

Because we have found that home videorecording constitutes copyright infringement and that appellees are liable for such use, the district court's judgment must be reversed and the case remanded for a consideration of the appropriate relief. The relief question is exceedingly complex, and the difficulty in fashioning relief may well have influenced the district court's evaluation of the liability issue. The difficulty of fashioning relief cannot, however, dissuade the federal courts from affording appropriate relief to those whose rights have been infringed.

Appellants stated at oral argument that they were seeking a remand to the district court so that the district court could fashion the appropriate relief. This approach makes a good deal of sense; a district court is in a better position to resolve, in an appropriate fashion, the relief question.

There are a number of possibilities that the district court may want to consider. Because of the difficulty of proving the precise nature of the harm to appellants, statutory damages may be appropriate. 17 U.S.C. § 504(c). The district court also has a broad range of equitable remedies from which to choose. Section 502(a) provides that the court "may ... grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." The district court determined that an injunction would not be an appropriate remedy. 480 F.Supp. 463–69. The court should reconsider this action.

We note that, as a general rule, a copyright plaintiff is entitled to a permanent injunction when liability has been established and there is a threat of continuing violations. Indeed, Nimmer states that "Generally, it would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a threat of continuing infringement." 3 Nimmer, *supra*, § 14.06[B] at 14–53—14–54. In discussing the analogous photocopying area, Nimmer suggests that when great public injury would result from an injunction, a court could award damages or a continuing royalty.[18] This may very well be an acceptable resolution in this context.

In fashioning relief, the district court should not be overly concerned with the prospective harm to appellees. A defendant has no right to expect a return on investment from activities which violate the copyright laws. Once a determination has been made that an infringement is involved, the continued profitability of appellees' businesses is of secondary concern.

IV.

RETAIL STORE USE

We find no error with the district court's discussion of the fair use question in regard to the retail store use. Therefore, we affirm that portion of the decision.

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[18] "Ordinarily it would be improper, and even an abuse of discretion for a court to deny a permanent injunction where liability and a threat of continuing infringement have both been established. But if one looks to other areas of property law it is clear that a property owner may be denied a permanent injunction against further violations of his property right where such an injunction would work a substantial injury to the public interest as well as to that of the particular defendant. *In such circumstances the property owner may be awarded, in lieu of an injunction, a reasonable royalty for the further use of his property. The courts might well conclude that photocopying practices for private use, particularly in the area of scientific writings, involve just such a public interest, so that a judicially created compulsory license as a substitute for injunctive relief could be found appropriate.*" 3 Nimmer, supra, § 13.05[E][4][e] at 13–91. [Emphasis added.]

V.

UNFAIR COMPETITION CLAIMS

In light of our previous discussion, we have decided to vacate the district court's earlier disposition of the unfair competition claims and remand for reconsideration. We express no view on the merits of these claims.

VI.

CROSS-APPEAL

The appellees below have cross-appealed because of the district court's failure to receive evidence on three affirmative defenses: (1) laches and estoppel, (2) copyright invalidity, and (3) unclean hands/copyright enforceability. On this appeal, we reverse and remand. The district court should give appellees an opportunity to establish these defenses.

CONCLUSION

We find no Congressional intent to create a blanket home use exception to copyright protection and that home videorecording does not constitute fair use. In addition, the appellees are legally responsible for the infringing activity. The district court's decision must be reversed and the case remanded for appropriate proceedings. The court should consider the unfair competition claims and the affirmative defenses. If appellants prevail on the defenses, the district court should fashion appropriate relief.

The judgment of the district court is reversed in part, affirmed in part, and the case remanded for appropriate proceedings.

IT IS SO ORDERED.

APPENDIX II

COMPARISON OF SELECTED RESPONSES FROM AVAILABLE VCR STUDIES

Survey (Date)	Audience and (Type of Survey)	Tapes Purchased (now) (Prerecorded)	Percentages Time-Shifting (Librarying)	Hours/Week Recording (During Prime Time)	Hours/Week Playing Back (During Prime Time)	Avoidance of Commercials	Effect on Commercial Television	Effect on Movie Going
Comparison for Public Broadcasting (Spring 1979)	250 VCR Households (Random phone survey using one week diary).		68% time shifting of PTV programs (found little evidence of librarying of PTV shows.)	19 min/day (60% during Prime Time)	7.1 hrs/week (7.5% of this prerecorded) (1/3 during Prime Time)		4% subscribe to cable 7% pay T.V. 6% both 83% had neither Viewed 4 hrs. real time T.V./day	
Crossley Survey for Sony (August 1978).	998	25	96%			25% use fast foreward through commercials		
Fields Research Corp. for MCA (June/July 1978)	305	32	75.4% time shift (75% library 15 tapes or less 23% substantial libraries)			58.3 eliminate sometimes rarely or never 56.1 pass sometimes rarely never		
Mediastat for MPAA (May, 1980)	250 VCR Households One week diaries	18.35 (3.46) [2.34]	52.0% time shift (31.2% librarying) 16.8% both	4.02 recordings week (Most during Prime Time or 11:30 p.m. on weekends	3.41 playback per week	83.2% while recording 83.8 while playing back 15.4% Never	24.8% subscribe to pay and/or cable T.V.	53.2% regular movie goers. New VCR owners may go out to movies more than long-time owners (but no indication rate long-time owners before purchase)
UCLA for Paramount	1,310 (94% owned VCR) (Questionnaire to consumer selected from mailing lists of Fotomat customers and Video Review Magazine		75% time shift (70% library) 75% use VCR to watch a movie or program several times.				47% watch commercial T.V. less (66% have pay T.V. service)	48% go to movies less. Pay T.V. subsubscribers (66% go to movies less. 85% of (66%) record movies off pay T.V. 69% are librarying. 51% watch fewer movies on comm. T.V.

APPENDIX III

MOTION PICTURE AND TELEVISION SALES IN FOREIGN COUNTRIES*

	1980	1979	1978	1977
Theatrical	1,010.44	1,011.4	921.67	664.0
Television	415.47	372.27	302.27	269.46
Total	1,425.91	1,383.67	1,223.94	933.46

*The above are estimates of the total revenue in millions of dollars to U.S. distributors. They are extrapolations based on accurate figures where known and predictions for the rest of the industry.

APPENDIX IV

COMPARISON OF SELECTED RESPONSES FROM AVAILABLE AUDIO TAPING STUDIES

Survey (Date)	Audience Polled and (Type of Survey)	Audio Taping Equipment	Recording Habits (within last year)	Purchasing Habits	Recording Sources	Why Tape?	Impact on Prerecorded Sales
Roper (6/79)	2004 adults 131 teenagers	43% 8-track player 18% 8-track recorder 38% cassette player 34% cassette recorder	21% of Adults (18 & over) 32% of children (10-17) 22% of total group (have taped music)	Found tapers bought more records, prerecorded tapes, and blank tapes than non-tapers. But also found those polled exaggerated LP's bought & also singles to lesser extent.	37% tapers (39% adults) from own collection 30% tapers (42% children) from radio 24% tapers borrowed material 10% live concerts	(N.B. 69% of all tapers (76% children were recording music) 53% library 15% re-record	(1) 122% potential sales volume of L.P.'s, prerecorded 8-tracks and cassettes; (2) 240% potential sales volume of singles. At face value sales of (1) would be 28% more; of (2) 93% more. But tapers would probably not buy 90% of everything taped; a more accurate-estimate may be 14% loss (based on taping borrowed items).
Hamilton (9/79)	1500 people nationwide (Telephone survey)	60% 8-track (45% record) 66% cassette (93% record 19% reel-to-reel	47% taped music or speech (51% of this 47% only taped music) 44% of music tapers tape at least once a week - majority tape between 1 and 5 hrs of music/month. 7% tape more than 10 hrs/month	Most spend $5-$20 on prerecorded material (1-5 items) and also buy 1-5 tapes in average month 62% spend more than $10 on prerecorded material/month	Primarily own sources or radio & T.V. 59% of those who tape music tape less than 2hrs/month from borrowed material 7% tape more than 6 hrs from borrowed material	51% use blank tape only once (librarying) 50% tape for convenience (including assembling songs from different albums in one place) Less than 20% to save money	70% of tapers say they would have purchased last item taped if unable to tape it. But 40% say purchases of prerecorded items increased since they began taping. However 40%, also say such purchases decreased. Some evidence more frequent tapers spend more money on prerecorded music (62% music tapers spend more than $10/month on prerecorded music
Warner (1980 -- refers to 1977 survey)	2,370 (3,385 in 1977) face to face interviews	67% of population access to tape players 40% of population access to recorders	41% of population had bought at least one blank tape; of those: 76% of tapers (21% total population) using cassettes; 32% (9% total pop.) 8-tracks; 5% reel-to-reel	82% of tapers current purchasers of prerecorded material 40% of non-tapers current purchasers... Also tapers spend more money on prerecorded music than non-tapers.	Albums Selections 45% (33%) own collection 34% (21%) borrowed 21% (40% radio (6%) live	45% made at least one tape to avoid buying (25% state main reason to tape is to save) 17% make a copy to use in car or at office 11% creativity 9% fun 9% convenience 10% for quality tape (3% main reason)	609 million (amount spent on blank tape) is lost 2.85 billion is saved (purchase price of all music taped)
CBS (On-going)	9,500 inverviews	Blank cassettes more popular than 8-track	55% taping more than last year	80% buy prerecorded material as well as blank tapes 1/2 buy prerecorded in addition to blank	40% own collection 30% borrowed 20% radio 5% live 5% t.v.	75% customize 55% save money	3 prerecorded sales/tape buyer are lost for every 4 blank tapes used. 700-800 million dollars lost per year

APPENDIX V

AGENCY FOR CULTURAL AFFAIRS (BUNKA-CHO)

3-2-2, Kasumigaseki, Chiyoda-ku, Tokyo 100, Japan

Cable Address: MONBUNKA TOKYO

August 17, 1981

Ms. Patrice A. Lyons
Attorney-Adviser
Copyright Office
Library of Congress
Washington, D.C. 20559
U. S. A.

Dear Ms. Lyons:

I would like to send you, under separate cover, a copy of the Report (in Japanese) of the Subcommittee on home taping.

The Report was submitted to the Commissioner of the Agency for Cultural Affairs on June 26, 1981. It concludes roughly as follows:

> "The Subcommittee has reached a conclusion that at present it is difficult to adopt particular measures to solve the problem of home taping from the following reasons: no agreement has yet been reached between the owners of rights concerned and the makers of recording equipment and materials on how to solve the problem; a full understanding of the problem has not yet been diffused among the general public; and it is still necessary to gauge the general trend of world opinion on how to solve the problem.
>
> However, on the understanding that, because of a remarkable spread of recording equipment suitable for home taping, it is not adequate to overlook the effect of hometaping practices upon the owners of copyright and neighbouring rights, the parties concerned and the Agency for Cultural Affairs should endeavour to take proper measures to diffuse a full understanding of the problem among the general public."

There is a general agreement that the owners of rights concerned, the makers of recording equipment and materials and the Agency for Cultural Affairs should collaborate in an effort to diffuse the knowledge of copyright among the general public, aiming at the solution of the problem in the future. The makers agree to give economic cooperation (contribution of some ten million yen) to this project of diffusing the knowledge of copyright.

AGENCY FOR CULTURAL AFFAIRS (BUNKA-CHO)

3-2-2, Kasumigaseki, Chiyoda-ku, Tokyo 100, Japan

Cable Address: MONBUNKA TOKYO

The Report also stressed the importance for the parties concerned of making efforts to reach an agreement among them on the problem of home taping. In this connection, there is a general agreement that the owners of rights concerned and the makers should continue negotiations, sitting around a "round table" on a non-governmental basis.

Hoping that this information would be of some use for you, and asking you, in my turn, to give us information on the progress in studies of the problem of home taping in your country,

Sincerely yours,

Y. Kimura

Yutaka KIMURA
Deputy Director
Copyright Division
Cultural Affairs Department

Senator **Mathias**. Ms. Sills.

STATEMENT OF BEVERLY SILLS, CHAIRPERSON, COALITION TO SAVE AMERICA'S MUSIC, AND GENERAL DIRECTOR, NEW YORK CITY OPERA

Ms. **Sills**. Thank you very much for allowing me to come.

I am the general director of the New York City Opera—I used to be Beverly Sills. I am here today as the chairperson——

Senator **Mathias**. I think there are a good many million Americans who are still sure that you are Beverly Sills, and very glad of it.

Ms. **Sills**. Thank you.

I am here today as chairperson, or even chairman, of the Coalition to Save America's Music. It is a group that broadly represents the American music community, which includes artists, musicians, songwriters, publishers, unions, performing rights societies, record producers, and retail outlets. The membership which is set forth in my written statement as an attachment to it is made up of 21 organizations with over 2 million members. I stress that because they include great groups of people that normally do not lie down with one another harmoniously. But they have joined here today all in agreement, which I must say is quite unprecedented, because we agree on this one basic thing that there does indeed exist a grave threat in uncontrolled home taping. "Piracy" is a much more simple name for it.

I am sure we have all rejoiced in listening to recordings by Mr. Caruso, Rosa Ponselle, and Ezio Pinza. Imagine if those recordings had never been made. Well, I sit at the head of the New York City Opera, which is an almost totally American opera company, with a whole group of extraordinarily gifted young American artists. I made my career in that company. Therefore, I can safely predict that there might be a few other superstars coming out of my company. But if less and less recordings are made and more and more home taping is permitted in an uncontrolled fashion, then these young singers are not only deprived of the choice of what they would like to be recorded in, but they are deprived of a very much-needed income.

I was lucky enough to document most of my roles, but what about these young singers coming along? Will their careers never be recorded or left to posterity because of this out-of-control problem? This may well be so because of the current economics of the recording industry. Release of recordings, particularly classical ones, is a very high-risk affair. Very few turn out commercially successful, and industry studies show that less than 10 percent of classical recordings break even. So that if record companies cannot earn profits even on the smaller percentage of records or tapes that do sell due to the pirating, then this entire segment of recording can whither away and die. I know this is so, because when I was recording, I was frequently told by EMI that my recordings were being paid for by the Beatles. Incredible as it seems, taping actually represents over 75 percent of all legitimate purchases. That is a very high percentage. And the reason people tape, according even to the tapers themselves, is to avoid having to purchase a record or a prerecorded tape.

I would like to tell you a little story that happened to me not more than 2 weeks ago. I was approached by a gentleman who said that he had the most complete collection of everything I had ever done on television, including talk shows where I then sang an aria or two, including my complete operas, including everything I had done in the last 12 years—and he offered to sell me my collection.

Can you imagine the outcry if we suddenly found that somebody had taken a whole bunch of new books and printed them cheaply and published them? Supposing we found that the number of new books had declined by one-third because of unauthorized copying, or that opera and concert performances had declined by one-third because of unauthorized admissions.

Now, I am not proposing that the freedom of consumers to tape music be denied. All I am proposing is fair compensation to the creators of that music. That is why we believe that amendment 1333 to S. 1758 is a reasonable solution to this problem, allowing some giving away and some taking back.

Some of my friends up here will examine in depth the severe economic impact record duplicating and taping have. But what really worries me is the corrosive effect on the very creative process itself. Record companies simply will be unwilling and unable to take risks on new artists, no matter how brilliantly these beckoning stars shine. A big thumb will be thrust down on creativity. I can see it already. The end result, of course, is detrimental to public interest. It is a denial of free choice and the beginning of cultural impoverishment.

The goal of our first amendment and copyright law is to encourage a maximum of diverse ideas and intellectual expression. Pirating has exactly the opposite effect.

Thank you.

Senator MATHIAS. Thank you very much, Miss Sills. I agree with you that is an astounding figure that 75 percent of all taping is off the market, privately done. So that would mean, I suppose, that 75 percent of all the tape libraries or home recording libraries are not coming through commercial sources, and this must have an enormous impact on the entire creative industry, the whole community of artists.

Ms. SILLS. I think it does.

Senator MATHIAS. Let me defer to the Senator from Kansas for a question.

Senator DOLE. The Senator from Kansas has no questions. I am trying to cover two meetings this morning, so I will listen awhile before I ask questions.

Senator MATHIAS. The Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

I just read through Ms. Sills' testimony, and I was struck by the same points you made, and I find that I do not have questions. I am delighted you are here, Ms. Sills. Like so many of us, I have listened to you on many occasions, both here and in New York and am enthralled to hear you sing. This is the first time in person I have heard you speak, and I enjoyed that, too.

Thank you very much for being here.

Ms. **Sills**. Thank you.

Senator **Mathias**. The Senator from Alabama.

Senator **Denton**. I have no questions. I also am delighted to see Ms. Sills here.

Ms. **Sills**. Thank you.

Senator **Mathias**. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

Ms. Sills, a concern that I have turns over the expectation of those who have performed way back in the past. And I can understand the concern about protecting the property rights of those who are performing today and those who have an expectation of recording their talents or those who are making movies, as we will talk about at a later time in the testimony this morning.

But a concern that I have turns on a cost to the consumers on those who have performed in the distant past, for example, on the making of "Gone With the Wind," a production in 1939. If there is a counterpart in your profession, do you think it is appropriate to set up a system where there will be royalties or revenues for those who performed so long ago that they had no expectation of having television revenues, for example, on reruns? My concern is to make some rational separation between those who are expecting it at the present time and have property interests that ought to be carried forward, as opposed to the other classes.

Ms. **Sills**. Of course, that is a very difficult question. I cited earlier the recordings, let us say, of Caruso and Rosa Ponselle and Ezio Pinza, all of whom, I am sure, have estates that claim certain rights. I know, Mr. Toscanini, for instance, with the wealth he left behind, has living relatives. I am sure there is an estate which would like to and would hope to collect royalties.

I would hope that somebody on this panel is more qualified than I to make any legal ramifications of what I say, that perhaps some kind of limitation, let us say, a statute of limitations going back to a certain time period, and perhaps correcting what you are raising. I do not know whether legally, anything like that can be done. I do know that some protection must be afforded people for the creative work they do, and it is up to minds, like the people in this room, to come up with a fair and equitable manner in which the right of these people is protected, as well as the consumers' rights. I am certainly not sitting here, saying, let's go get the consumer; I am not after that at all. I am, in a sense, looking at my 200 young singers, who desperately need income, who have the right to choose what they would like to be heard in. They should have some control over their talents and some rewards for their talents, as well. At the moment, it is all too one-sided, and that is not happening.

I have been, as I cited before, with this gentleman wanting to sell this entire collection to me—I do not feel victimized. My career is over, and I have made my place in history, and I have made a great deal of money in my career. I am looking to the future now for these youngsters. If the record industry dries up, then 10 or 15 years from now, nobody will ever know who they are or what they have done or what contribution they have made in beautifying our lives. And I would just like to see that those rights are protected and that the opportunities remain for these young artists to make documentations of their extraordinary talents.

Senator SPECTER. I think most of us share the concern which you have just expressed about those who are recording today. If you use the example of Caruso, which you just referred to, I think that a principal concern of the law is to reward expectations. At the time that Caruso performed, I don't know what the state of the art was or whether there was a reasonable expectation that he might have. And if he had such an expectation, it might be appropriate to pass it on to his estate and his heirs, or it might not be. But there might well be some cutoff as to those who have performed in a day when the technology was not present for reproducing, just as the technology was not present for pirating reproductions, and that there may be an analog on the singing as there is to a movie like "Gone With the Wind", that the expectations who made "Gone With the Wind", I think, were not that there would be replays on television. They would have very long-term rights to those kinds of royalties. I am interested in your response, that you would think it appropriate to have a cutoff.

Ms. SILLS. I think it can be considered—there is a danger in saying to somebody who perhaps created something wonderful 25 years ago, "Well, you are only allowed so much compensation because 25 years ago, who knew that this would be such a big success". That hardly gives any kind of incentive to creativity. I think a great many things we do—as an example, in my opera company, I do for "brownie points"—we get credit for doing esoteric works. And I think a lot of recordings are made with that same idea, to bring, perhaps, to a smaller number of people some very special kind of music. If that suddenly hits it big, I do not think it should be penalized in 25 years—perhaps, if there is a delay in the success of it—I do not think we should say, "Well, we did not expect that to happen at the time we made it; therefore, perhaps you are not entitled to so much." So we have to be very careful of that, too. I think something that is creative—Mr. Caruso, whether he expected that some day, the recording industry would grow to such proportions, I do not think is the point. The point is, he did make an extraordinary recording. We are enjoying his talents, and we are using his talents over and over again, and why not have some reward for his estate or family. Why deprive his estate or family of it because perhaps 40 years ago, we never thought that—we never had such expectations. So there is a little double-edged sword there.

Senator SPECTER. Well, your point on the brownie points is well taken. Mr. Caruso would still get brownie points for having the achievement. We are going to debate whether he ought to get any "greenie" points to have the financial compensation. I think I might part company with you on the issue of Caruso, but I am not sure. But the delineation that I think is important is that there be a proper recognition of those who are performing today so that the arts can be promoted and that there not be a taking of their property rights. And I would back up beyond today to those who had performed with an expectation that these reproductions would produce revenue for themselves or their estates. But I have a real question about those who had performed at a time before there were reproductions, so that they did not have that expectations, or certainly could not have anticipated the pirating. But I am very interested in your view.

Thank you very much, Mr. Chairman.

Senator **Mathias**. I noticed Mr. Ladd stirring creatively in his seat when you asked the question about retroactive participation.

Mr. **Ladd**. I would like to respond to Senator Specter's point. There is a limitation on how long the copyright owner could enjoy returns from a collection of royalties here or elsewhere, and that is the term of the copyright itself.

The second point is that this is not the first time that it has been necessary to decide the question as to whether the work extends into a new medium that was available—just as when radio came along, and most tellingly, when television opened up an enormous new market for previously made motion pictures, which all of us have seen on the late show.

Now, there was no question the copyright was in the work, including the translations or new versions of the work that can be made in other media. There never really was a serious question of whether it lay within expectations or not, that the owners of the copyright and the motion pictures would earn revenues and royalties from the display of that on TV, and there have been concomitant changes in the industry where the trade unions and artisans have bargained for their share. In recent years, a major element of the negotiations between the motion picture and film production companies and the unions has been the degree to which the unions will be members, will be allowed to participate in the new revenues from cable and the subsequent showings.

The final point that I would make, Senator Specter, is that as we argue in the prepared statement, it is my belief that the statute was specifically tailored, fashioned, to allow the broadly declared rights to cover the new media and technologies as they appear, and that that is done by the very architecture of the act.

I understand your point, and I respect it, of course, but I really do not believe that expectation at the time of creation is the test of whether or not the copyright should extend.

Senator **Specter**. Well, would you say on the "Gone With the Wind" example that the producers there should have the rights to revenues to the full term, what the copyright laws currently allow?

Mr. **Ladd**. Of course—as long as people will pay to see it—and that, apparently, is going to be decades.

Senator **Specter**. How long will that protection extend?

Mr. **Ladd**. Well, the statute provides for the life of the author plus 50 years, and in the case of a work-for-hire, there is a different set term of 75 years. So there is a limitation.

Senator **Specter**. So that would extend to the year 2015. Well, I have some problems with that. My own sense is that we have the competing interests of the consumers as contrasted with the artists. And while I understand your contention that expectations may not have been a part of the original laws you cite, it is my own thinking that it is a dominant force in the law generally, and that as we tackle the new technology which is present with the Betamax and try to find some balancing between a consuming public which is very anxious for the reproductions and an appropriate compensation for those who have made these works of art, that there is some line beyond which we ought not to go, and that when we talk about current artistic developments, I am certainly very sympathetic there, or when we talk about people who made movies in the fifties, sixties, certainly in the seventies, with the expectation of television, yes. But if you are talking about the thirties, then I start to wonder.

Mr. LADD. One final point. Sound recordings have been protected only since 1972, and even though sound recordings which are protected under State law doctrines prior to the enactment of the Sound Recording Act of 1971 have a terminal limit on them in the statute now.

Senator SPECTER. And what is that terminal limit?

Mr. LADD. That is also 75 years.

Senator SPECTER. What do you think about a 75-year terminal limit? That is a pretty long statute of limitations.

Mr. LADD. It tends to be normative in other systems. As a matter of fact, our extension of the term in the general revision of 1976 was to bring it into more general conformity with terms abroad.

Senator SPECTER. Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Senator Specter.

Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman. I have no questions at this time.

Senator MATHIAS. Senator Denton.

Senator DENTON. Thank you, Mr. Chairman. I wanted to make sure that I had caught up on previous testimony so as to avoid asking a repetitious question.

I believe that I have come a long way in understanding the issues. Frankly, I was originally very ill disposed toward Senator Mathias' bill. I thought of the issue in terms of book borrowing and that sort of thing, which is an argument that I understand has been answered.

One of the remaining problems I see is the fee, or surcharge, or whatever you are going to call it, on the machine itself—first, the amount of it, and second, the justification for it. I understand that the number of tapes owned by a consumer would be an indicator of the use to which they were being put. I do not understand yet how a surcharge on the machines which I still believe will be passed on to the consumer, would be justified in view of the uncertainty as to the use to which it would be put. In other words, the consumer might make family movies, or whatever. How would you answer that, Mr. Ladd?

Mr. LADD. Whatever survey you look at, Senator Denton, I think it is clear that a very large portion of taping is done of copyrighted materials. The contending parties following us will probably give you a lot of data and a lot of surveys about what kind of taping is done by whom. But I think that on the basis of our personal experience, as well as on the surveys, it is clear that a large part of it, probably the very large part of it, is taping copyrighted materials. Now, undoubtedly, there will be some taping of noncopyrighted material, home movies, and the like. That is my answer to that.

Senator DENTON. Well frankly, it sounds like a shotgun approach, because even though statistics indicate that a great number would be used this way, what about the poor guy who does not use it that way, and yet, he is still paying for it?

Mr. LADD. Well, that is an interesting point. There is a provision in the bill, as you probably know, that in setting the rate, the Copyright Royalty Tribunal can take into account statistically measured use for purposes other than copying copyrighted materials and adjust the royalty accordingly. That, however, does not finesse the point as to that what I believe to be small amount of usage, both of the machines and the tapes, for not copying copyrighted works. There will be the royalty on that tape, as well. So I think that should be exposed very clearly. I think that the committee will want to look at the evidence of exactly what those magnitudes of use are.

Senator MATHIAS. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

I would just like to ask Mr. Ladd one question, and it is a question I will be asking of others in different forums. But isn't the Copyright Royalty Tribunal an inadequate regulatory body to deal with such a complex royalty fee structure as we have been talking about here? I wonder whether or not having a hard time doing the job assigned to them already, if they were given the job of putting together a royalty fee structure, whether they would actually be setting it by law, are they going to be just so overwhelmed that nothing will come out?

Mr. LADD. I do not believe that that is the case. The effectiveness of the Copyright Royalty Tribunal was assessed in a recent GAO study which was conducted at the request of the House Committee on the Judiciary. Their conclusion was that they were doing their job fairly well. I have not seen anything in the performance of the Copyright Royalty Tribunal which suggests that they are not able to set these rates, as indeed, they set comparable rates now.

Now, let me be frank. In a setting that is not nearly of the commercial importance of this, under section 118 relating to the compulsory license for public television to use certain copyrighted works—as a matter of fact, that section of the bill, I think, was offered by Senator Mathias.

Senator LEAHY. But you understand that if they were given the authority, or actually, the requirement, for setting the kind of royalty fees in the fields we have been talking about here, the type of pressure they are going to have, the type of hearings that are going to be demanded of them, are going to be pretty significant. Obviously, the economic interests involved, the economic, social, and all other interests involved are going to put enormous demands on them. You do not think that those demands would be such to overwhelm their capacity?

Mr. LADD. Senator, I think they are likely to be of the same kind of magnitude as the pressures of the proceedings to distribute the cable television royalties.

Senator LEAHY. Speaking of one that is fun, yes.

Mr. LADD. Yes; and I suggest you ask the Chairman of the CRT whether he thinks he can do it.

Senator LEAHY. Thank you, Mr. Ladd.

Thank you, Mr. Chairman.

Senator MATHIAS. I have just one brief question of Ms. Sills. Over the Easter period, you gave the nation an Easter gift in the form of a performance of "Lucia di Lammermoor". Now, so that we all understand exactly how this will work, do you expect that a cultural performance of that sort will benefit, will have their share of these royalties, as well as the commercial programs, films, and other productions?

Ms. **Sills**. Yes. We do those tapings under the aegis of "Live from Lincoln Center", and it is actually Lincoln Center that owns those tapes, which we hope will eventually be sold and that we will receive a percentage of the sales. As a matter of fact, one of my fund raising joys at the moment is that I am trying to raise money so we can tape our own shows and own them ourselves, so that when we sell them, we will get the complete kitty instead of having to share it with Lincoln Center or anybody else.

But yes, I do think that the potential revenue for a nonprofit organization such as mine—and we are very nonprofit—will be just absolutely lifegiving.

Senator **Mathias**. And it would be essential to continuing cultural programs to have this participation.

Ms. **Sills**. Yes; it certainly will.

Senator **DeConcini**. Well, would the chairman yield on that point?

Senator **Mathias**. Yes.

Senator **DeConcini**. Ms. Sills, do you subscribe that the cultural benefit is greatly enhanced if more people can have available such tapes, or if they should tape it themselves from a TV show for reviewing only for their personal use—isn't that a very cultural beneficial part of our society?

Ms. **Sills**. Well, I have certainly no objection. The more people who hear opera, the better. I have an objection that that young lady who sang "Lucia" is deprived of income. I would hope that they tape it at home and play it. I would just hope that she gets a tiny share of the pleasure. And, should there be some fee attached to that blank that that person who records it for his own use has to pay, and that she gets a tiny share of it, then by all means—I am not trying to keep opera out of the home, I am trying to get it into the home—so if they would like to tape that live performance off the air for home use, that is fine. I certainly do not object to that. They might be encouraged to come and see a live performance, which is what I am after. But I do think that they should be prepared to acknowledge that Ms. Rolandi is a great young American singer and deserves to be paid for her efforts.

Senator **DeConcini**. Well, I cannot argue with that. Indeed, she deserves to be paid, and she is great. What if there were commercial advertisers who were paying for the showing of that and remitting some payment to the entertainer or to the artist? Would that make any difference to you whether or not then there was a home use tape made, and the person should also pay for recording it in home for their own use, if the person had been paid and it was advertised on the broadcast network, rather than a charitable effort, as we have before us in this example?

Ms. **Sills**. Well, inasmuch as you are talking to a nonprofit organization, I would be very remiss to hand away any kind of income that could be derived from commercial sponsorship, which I should like to tell you I do not see anywhere down the long road. But again, I also do not feel that I can hand away the talents of the artists who participate in that event, simply because a sponsor is—that is like making a recording, and that is, of course, underwritten by the recording company, but the potential source of income is in the royalty for the artists, and that is what I would still have to go after.

Senator DECONCINI. The artist should get a payment or be paid by the sponsor, then, for the use of it?

Ms. SILLS. And by the people who use it.

Senator DECONCINI. And by the people who would record it in their own home?

Ms. SILLS. Yes.

Senator DECONCINI. In other words, two times.

Ms. SILLS. Isn't it part of the American system to get paid for the work we do?

Senator DECONCINI. Oh, no question about it, and I believe in that system.

Ms. SILLS. Well, why stop with the artists?

Senator DECONCINI. I agree with you, it is. It is a matter with this Senator of whether or not people who are using this in their own home for their own use only, at no commercial value, should be charged once again when, with the hypothetical that I present to you different than the actual case, granted—the hypothetical I present to you that a commercial venture is making money by selling it and paying the artist. Must we continue to tax the American consumer once again, when it is only for re-viewing, reshowing in their own homes? Seventy-five percent of these are done only for reshowing at a different time, so there is no one making any money; there is someone enjoying something under the hypothetical I have given you that has already been paid for.

Ms. SILLS. Well, the cost of putting on that "Lucia" that you saw was probably $450,000. That money has to come from someplace. You know, the artist is also the consumer. My singers also are paying high interest rates, putting braces on children's teeth, and sending them to colleges. We are not talking about an ascetic human being who sits up there and can offer her talents free because God kissed her vocal chords.

Senator DECONCINI. Oh, I am well aware of that.

Ms. SILLS. We have people who also are in the same financial predicament as the person who is buying that machine. I do not happen to feel that in the purchase of a machine, a one-time charge on the machine is exorbitant for the number of events they will be able to tape at home. While I realize there might be some lack of parity, let us say, by the person who just does it for home movies, that is always the case in our lives. I know that a lot of my money pays for roads out in Nebraska that I will never use, but that is all part of the American system. That is the way our country is made, and that is how we succeed. We have people who work for a living, and we pay them for their gifts, whether they happen to be vocal, or whatever.

I do not happen to feel that it is punitive. I feel that it is punitive to the artist to be exploited.

Senator DECONCINI. Do you feel the legislation that would exempt is punitive to the artist?

Ms. SILLS. Yes; I do.

Senator **DeConcini**. Thank you.

I have no further questions.

Senator **Mathias**. Are there any further question of this panel?

Senator **Denton**. Mr. Chairman, if I may, I would ask your dispensation to leave at this point. I have a conflicting engagement. And I hate to miss the next panel, because one of the ladies in my office asked for a similar dispensation from all of the 10 Commandments from one of the witnesses who will be coming up. [Laughter.]

Senator **Denton**. But I especially regret leaving because I was going to introduce a fellow Alabamian, Mr. Buddy Draper. I will be unable to do so, and may I give to you my statement, introducing him, and would you be kind enough to read it, sir, after my departure?

Senator **Mathias**. It will be entered into the record, nunc pro tunc.

Senator **Denton**. Thank you, sir.

Senator **Metzenbaum**. Did I miss any singing?

Senator **Leahy**. Many of us were brought here because the chairman was going to sing for us. I find that the "truth in packaging" law has been violated, and he is not going to sing after all, Howard. [Laughter.]

Senator **Mathias**. The chairman seldom sings before 11 p.m. [Laughter.]

Well, I do think the record should reflect the fact that attendance has been high today, and I think Ms. Sills can take some pride and pleasure in the fact that she has contributed to the quality of the work of the Congress.

Ms. **Sills**. Thank you.

Senator **Mathias**. Thank you very much.

[Prepared statement of Beverly Sills follows:]

Statement of Beverly Sills, Chairperson, Coaltion to Save America's Music

My name is Beverly Sills. I am General Director of the New York City Opera.

I appear here today as Chairperson of the Coalition to Save America's Music. With me are Stanley Gortikov, President of the Recording Industry Association of America; Alan Greenspan, the noted economist; Victor Fuentealba, President, American Federation of Musicians; Jack Golodner, Director, Department of Professional Employees, AFL-CIO; Buddy Draper, Executive Director, Muscle Shoals Music Association.

The Coalition to Save America's Music is a broad-based group representing every segment of the American music community. The Coalition includes performers, musicians, songwriters, publishers, record producers, and retail merchandisers. The membership of the Coalition, comprising 21 organizations with over two million members, is identified in the attachment to my statement.

The Coalition strongly supports Amendment No. 1333 to S. 1758. The Mathias Amendment, while protecting the freedom of our citizens to tape music for their own private use, also assures fair compensation to the creators of that music. This legislation is critical to preserve the vitality of the music industry and to assure the public of the maximum diversity of music - music designed to meet all the tastes and interests of our pluralistic society - classical, jazz, gospel, country and western and, yes, even rock and roll.

We have a rich musical heritage that makes a distinctive contribution both to the enrichment of our lives and to our balance of payments. That heritage must be preserved and nourished and that requires a healthy American recording industry. Unfortunately, its future is now being threatened - and the culprit is audio home taping.

While home taping has been around for some time, in the last few years it has gotten out of hand. Millions are now taping instead of buying. As every recent study has shown, the taping of prerecorded music has increased dramatically in the last few years. Today, about half of our homes have tape recording equipment. Tapers, according to the Warner Communications 1980 Survey, are now duplicating music with a market value of $2.85 billion per year. The total value of all prerecorded music sold in the United States, in contrast, was only about $3.5 billion.

In other words, incredible as it seems, taping actually represents over 75 percent of all legitimate purchases. And the reason people tape, according to tapers themselves, is to avoid having to purchase a record or prerecorded tape. Dr. Greenspan and other witnesses will discuss the severe economic impact of taping on the record and music communities. I want to touch on the less visible but no less significant impact on the creative process.

As the sales of records declines, record companies are less able to take risks on new artists and new songwriters, or to experiment with different and innovative musical formats. They will concentrate on popular and proven artists and music. And they will release fewer and fewer records. That is already happening. According to industry statistics, the number of new records released has declined by almost one third in the past three years. Can you imagine the outcry if we suddenly found that the number of new books had declined by one-third because of unauthorized copying? -- or that opera and concert performances had declined by one-third because of unauthorized admissions?

Well, sadly, that is the state of the record industry today. There are fewer and fewer releases of records for music listeners -- less innovation and less experimentation -- and, as a direct result, fewer opportunities for new talent.

The reasons are not hard to understand. For example, in my field, the release of classical records is a high-risk affair. Industry studies show that less than 10% of classical records break even - fewer earn money. If record companies cannot earn profits on the very small percentage of records that are commercially popular, they will cut back their risks on all other types of music. This is happening today. It will grow worse.

The end result is fewer and fewer choices of music for the public, and fewer and fewer opportunities for creative talent. That is surely contrary to the public interest. It is also contrary to the goals of our copyright laws.

Congress should act now to protect the creative process -- and to harmonize artistry and technology. Both should be respected. Our citizens should be free to tape music in the privacy of their homes for their own use; they should have the maximum access to music in whatever form they prefer. That is good for the public, for the arts, and for the artists.

We in the Coalition want to stimulate the broadest possible interest in music. At the same time, the creators of that music should receive fair compensation for their creative efforts. That is only fair. And it is the only way to assure that the constitutionally guaranteed protection of the copyright will function effectively and produce the desired result - more music for more people.

Coalition to
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Coalition to SAVE AMERICA'S MUSIC

The Coalition to SAVE AMERICA'S MUSIC represents nearly 2 million individual members and about 1,000 companies.

The objective of the music industry and our SAVE AMERICA'S MUSIC Coalition is to support the passage of Amendment 1333 (to Senate Bill 1758) in the Senate, and House Resolution 5705 in the House -- and we urge Congress to enact them promptly.

American Federation of Musicians (AFM), 1500 Broadway, New York, NY 10036, (212) 869-1330 -- Membership, 300,000, affiliated with the AFL-CIO. Protects the employment rights of professional musicians in all fields in the U.S. and Canada, including collective bargaining agreements.

American Federation of Television & Radio Artists (AFTRA), 1350 Avenue of the Americas, New York, NY 10019, (212) 757-8833 -- Membership, 55,000. Negotiates and administers collective bargaining agreements for professional performers and broadcasters for live and taped broadcast performances, phonograph recordings and audio-visual productions.

American Guild of Authors & Composers (AGAC), 40 W. 57th Street, New York, NY 10019, (212) 757-8833 -- Membership, 4,000. Protects its American songwriter membership through the AGAC Contract dealings with music publishers.

American Society of Composers, Authors & Publishers (ASCAP), 1 Lincoln Plaza, New York, NY 10023, (212) 595-3050 -- Membership, 30,000. Founded in 1914 to license and collect fees for the rights to public performances of its members' copyrighted musical works, and to distribute such income.

Black Music Association (BMA), 1500 Locust Street, Suite 1905, Philadelphia, PA 19102, (215) 545-8600 -- Membership, 2,000. Includes performers, producers, promoters, and record company executives whose objectives are to promote, perpetuate and preserve black music.

Broadcast Music, Inc. (BMI), 320 W. 57th Street, New York, NY 10019, (212) 586-2000 -- Affiliates, 68,000. Founded in 1940 to represent writers and publishers, licensing, collecting and distributing fees for their publicly performed musical repertory.

(more)

Country Music Association (CMA), P.O. Box 22299, Nashville, TN 37202, (615) 244-2840 -- Membership, 6,000, including international representation. Trade association dedicated to promoting and preserving country music through such activity as the CMA Awards Show and the Country Music Foundation.

Gospel Music Association (GMA), P.O. Box 21201, Nashville, TN 37202, (615) 242-0303 -- Membership, 2,000, with international representation. Service organization whose purpose is to represent, promote and spread the word about gospel music, including presentation of the annual DOVE Awards.

Music Publishers' Association of the United States (MPA), 130 West 57th Street, New York, NY 10019 -- Membership, 61. Objectives are to promote the continuing education of music publishers, nationally and internationally, and to foster good relationships with the music trade.

Nashville Music Association (NMA), 14 Music Circle East, Nashville, TN 37203, (615) 242-9662 -- Membership, 805 including 95 founding members. Trade association dedicated to represent all forms of music entertainment in Nashville.

Nashville Songwriters Association International (NSAI), 25 Music Square West, Nashville, TN 37203, (615) 254-8903 -- Membership, 2,000. Dedicated to the advancement of musical composition and the protection of member rights, it holds educational seminars and maintains a Hall of Fame.

National Academy of Popular Music (NAPM), 1 Times Square, New York, NY 10036, (212) 221-1252 -- Membership, 350. Maintains Songwriters Hall of Fame, museum and reference archives on popular music, and annually elects members to Hall of Fame.

National Academy of Recording Arts & Sciences (NARAS), 4444 Riverside Drive, Suite 202, Burbank, CA 91505, (213) 843-8233 -- Membership, 5,000. Involved in creative process of sound recording. Members, including singers, musicians, songwriters, composers and engineers, vote for and present annual GRAMMY Awards.

National Association of Recording Merchandisers (NARM), 1060 Kings Highway North, Cherry Hill, NJ 08034, (609) 795-5555 -- Membership, 500 retailers, rack-jobbers and independent distributors of sound recordings. Trade association founded in 1957 to protect the interests of the merchandising community and to promote the industry. Associate members include record companies and suppliers.

(more)

National Music Council (NMC), 250 W. 54th Street, Suite 300, New York, NY 10019, (212) 265-8132 -- Membership, 1,500,000 in 61 national music organizations. Umbrella organization chartered by Congress to function as an information and coordination service for members that include composers, lyricists, musicians, singers, teachers, publishers, music licensing groups and recording companies.

National Music Publishers Association (NMPA), 110 E. 59th Street, New York, NY 10022, (212) 751-1930 -- Membership, 275 publishers. Trade association representing publishers of American music, including fields of popular, classical, sacred, educational, concert, gospel and country music, collects and administers royalties through the Harry Fox Agency.

Recording Industry Association of America (RIAA), 888 7th Avenue, 9th Floor, New York, NY 10106, (212) 765-4330 -- Membership, 55 U.S. recording companies. Trade association founded in 1952 to work for the mutual interests and betterment of the industry. Activities include Anti-Piracy Intelligence Unit and certification of RIAA Gold/Platinum Records Award.

SESAC Inc., 10 Columbus Circle, New York, NY 10019, (212) 586-3450 -- Affiliates, 1,500. Licenses and collects fees for use of works of its 1,000 songwriters and 500 publishers, and actively promotes its membership.

Society of Professional Audio Recording Studios (SPARS), 1400 North Crescent Heights, Los Angeles, CA 90046 (213) 656-9467 -- Membership, 100 recording studios, major manufacturers, record companies and producers. Trade association dedicated to excellence through innovation, communication and education.

-30-

Addendum

American Society of University Composers
Songwriters Resources and Services

Senator **Mathias**. Our next witness will be the inimitable Jack Valenti, accompanied by a panel of Charlton Heston, Jay Eliasberg and James Leonard.

Mr. Valenti, do you wish to lead off for this panel?

STATEMENT OF A PANEL INCLUDING JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC.; CHARLTON HESTON, ACTOR, DIRECTOR, PRODUCER, AND PRESIDENT OF THE SCREEN ACTORS' GUILD; JAY ELIASBERG, FORMER VICE PRESIDENT, RESEARCH, CBS BROADCAST GROUP; AND JAMES R. LEONARD, VICE PRESIDENT, ROBERT R. NATHAN ASSOCIATES, INC.

Mr. **Valenti**. Thank you, Mr. Chairman, I will.

First, I would like to request the following documents be inserted in the record as part of my testimony. I am told that the committee prefers that I should make such request formally. These include a memorandum of constitutional law and copyright compensation prepared by Prof. Laurence Tribe[1] of the Harvard Law School; the testimony of Donald Tatum, chief of the executive committee, Walt Disney Productions; the testimony of Judd Taylor, president of the Directors' Guild of America; the testimony of Jack Copeland, chairman of the copyright committee of the Training Media Distributors' Association; the testimony of Richard Orear, president of the National Association of Theatre Owners; and the testimony of Gene Allen, vice president, International Alliance of Theatrical Employees and Moving Picture Machine Operators of the United States and Canada.

Senator **Mathias**. Without objection, those documents will be included in the record.

Mr. **Valenti**. Following me, Mr. Chairman, will be Mr. Charlton Heston, for 7 years, president of the Screen Actors' Guild—and I need not tell you that that is a way station on the way to a higher position in our land; Mr. Jay Eliasberg, former vice president and director of research at the CBS Broadcast Group, and Mr. James Leonard, vice president of the Robert R. Nathan Associates, Inc.

With that introduction, Mr. Chairman, I will now apply my stopwatch to begin my 5 minutes.

Senator **Mathias**. I will call your attention to the fact that you have the green light, and your time is now running. When it gets down the end, the yellow light will appear, and when the red light comes on, you are going to get the gavel.

CONSTITUTION GUARANTEES COPYRIGHT PROTECTION

Mr. **Valenti**. The constitutional platform, gentlemen, on which this entire issue rests is simply this—that creative property is private property, like land or your home or your car, and no one should have the right to use that property without compensating the owner or getting the permission of the owner. That indeed was the essence of the Ninth Circuit Court's decision, which confirmed the sanctity of private property, and all else that will be said here today, Mr. Chairman, is irrelevant to that central, dominating issue that intellectual property, is private property and is entitled to the protection ordinarily given private property.

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[1] Previously submitted by Sidney J. Sheinberg of MCA Inc. and can be found on page 78.

AMERICAN FILM INDUSTRY IMPORTANT TO BALANCE OF TRADE

I believe it the duty of the Congress to nourish and to protect a great national trade asset. The U.S. film and television industry brought back to this country last year almost $1 billion in surplus balance of trade. American film is the one U.S.-made product that the Japanese, whose skill in other fields is beyond all comparison in their conquest of world trade, are unable to duplicate, replace, or clone. If that asset is wasted through the unlicensed use of videocassette recorders in this country, then the Japanese will have succeeded in eroding our surplus balance of trade, though they themselves cannot make movies for an international audience.

ALL USERS REQUIRED TO LICENSE FILM PRODUCT

The lobbyists for the Japanese recorder manufacturers claim, "The VCR is the best friend the Hollywood producer ever had." Well, with such friends, we will soon become an entertainment desert in this country. Now, why is this so?

In the marketplace where film is licensed all who choose to use theatrical film and television programs must license those programs from the owners of those film properties. That is the way the marketplace operates today—theatres, pay cable, pay television, prerecorded cassettes, network television, local station television all license copyrighted works from the owners of those works. The VCR is the only unlicensed medium in the marketplace today—the only medium that does not have the permission of the owner of that property to use it—and yet, the VCR has one primary mission, and that is to tape copyrighted material, private property that belongs to others.

MAJOR USE OF RECORDERS ELIMINATES COMMERCIALS

Surveys in 1981 by Media Statistics, Inc. of Silver Spring, Md., show conclusively that 75 percent of VCR owners library tape for their permanent collections. Mr. Ladd, the Reporter of Copyright, alluded to that fact in testimony a few moments ago. Eighty-seven percent of VCR owners use fast-forward and visual search gadgetry on their machines to erase commercials. For example, the Sony Remote Betascan can zap out a 1-minute commercial in just 3 seconds. And I submit for the record, Mr. Chairman, a letter from the vice president and director of marketing of Frito-Lay, a multi-million-dollar buyer of advertising time, which says that Frito-Lay will not pay for viewer ratings that include home taping, or if they do pay, it will be at a greatly reduced rate.

FRITO-LAY, INC.,
April 19, 1982.

Mr. JACK VALENTI,
Motion Picture Association,
Washington, D.C.

DEAR JACK: I am writing to confirm several comments that I have made orally in conversation with you.

As I told you, the area of VCR media is relatively new, and Frito-Lay does not have any documented policy for this media form right now.

My personal point of view is this:

(1) VCR penetration of households will continue to grow;

(2) VCR devices allow consumers to record program materials, but delete commercial messages;

(3) Some method of measuring whether a "set-in-use" is hooked up to a VCR will have to be developed and used;

(4) The burden of proof will be on the television networks to provide data on VCR usage;

(5) Advertisers either will not pay for VCR—associated message delivery, or they will pay at a reduced rate, given the potential for deleting commercial messages.

While I cannot commit Frito-Lay or PepsiCo on what may be hypothetical issues, I would anticipate that we would negotiate rate concessions on an "up-front" basis with networks once VCR penetration becomes significant (10% of households).

Sincerely,

John M. Cranor,
Vice President, Marketing.

ADVERTISER-SUPPORTED "FREE" TELEVISION WILL BE HARMED

Advertisers will not pay, or they will pay less for commercial messages which never reach their intended audiences, which in turn will reduce revenues to the networks, which in turn will reduce revenues to the creative community as Ms. Sills pointed out, which in turn will reduce investment in new movies and new television programs. That is an axiom of the marketplace, and the public is the ultimate victim.

HOME TAPING WILL NOT BE AFFECTED

Let me emphasize, no one wants to prevent taping in the home. I think Senator DeConcini knows how I feel about that. I want very much to permit noncommercial taping in the home. But I say believe it must be linked to a license to use the product; the simple and sensible way to do that is a copyright royalty fee on the video machines and the blank tapes. To exempt home taping from copyright infringement without the copyright fee would be unconstitutional, as the legal memorandum from Lawrence Tribe, professor of constitutional law at Harvard Law School, clearly points out. It appears that such legislation would violate the "takings" clause of the fifth amendment.

MUSIC INDUSTRY ALREADY SERIOUSLY HARMED BY TAPING

The music industry, as you have heard and as you will hear later in this hearing, has been terribly wounded by millions and millions of unlicensed taping. That same contagion is going to be visited on the visual entertainment arena. When there are 20, 30, 40 million of these VCR's in the land, we will be invaded by millions of "tapeworms," eating away at the very heart and essence of the most precious asset the copyright owner has, his copyright.

RECORDERS DO NOT CREATE ENTERTAINMENT

Please, remember this, gentlemen. Japanese machines do not create entertainment. The American film industry does. The opposition lobbyists will tell you; "Well, the film production industry does not have to license its product to free television. Keep it off of free television, and get more money from pay cable. That is the way the marketplace operates," they say. This is fiscal and political nonsense, and they know it. What they are advocating is that cable franchise raise monthly rates to their subscribers, and movie producers keep our product, our film, off of the home television sets of millions of Americans who cannot afford to buy an $800 to $1,000 video recorder machine. Yet people who can afford only free television depend on it as their sole form of home entertainment.

TELEVISION VIEWERS WILL LOSE OUT

Who speaks for these people, the less affluent and the less comfortable? As an economist, Mr. Robert Leonard, will testify that the portion of the copyright fee which the public will be minimal—I will be done in 45 seconds, Mr. Chairman—and the competitive marketplace will keep the prices of the recorders and tape low. Actually, none of the royalty fee ought to be passed on to purchases of recorders or tape, Mr. Chairman. In 1982, the net profits of the six Japanese companies that manufacture all the VCR's sold in this country will be about $3.2 billion. With that kind of margin they can easily absorb the royalty fee. Indeed, one company, Matsushita, the largest maker of VCR's in the world, makes more net profits than the entire U.S. film and television production industry combined.

Is it not in the public interest to insure this continuous flow of entertainment to the American public? Creative works do not spring, like Athena, full-grown, from the forehead of Zeus; they come from hard work, they come from creative labor, from investment capital, they come from the fragile imaginings of hundreds of thousands of Mr. Heston's coworkers, who supply films and television programs to the world. The Mathias amendment, in our judgment, is a rational answer: Permit taping in the home under a licensing process that parallels all other distribution systems in this land, and do it before the tidal wave of VCR's from Japan collapses the steady flow of entertainment product for the American viewer.

PRIVATE OWNERSHIP IS PARAMOUNT

The time for the Congress to act is now. It is absolutely essential that the rights of private property ownership be settled by law, else the new technology is going to outrun the law. And I think that is why Congress has to act now to define these rights in the interests of the millions of Americans who cannot afford to buy these expensive machines.

Thank you.

Senator MATHIAS. You just made it, Jack.

[Laughter.]

[Aforementioned prepared statements follow:]

STATEMENT OF JACK VALENTI
PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

SUMMARY OF TESTIMONY OF
JACK VALENTI
IN SUPPORT OF
AMENDMENT 1333 TO S.1758
HOME RECORDING LEGISLATION

THE U.S. FILM AND TELEVISION INDUSTRY IS A HUGE AMERICAN ASSET WHICH MUST BE PRESERVED

-- The U.S. film and television industry is a great national asset. It forms a trade asset of significant and continuing value to the U.S. Treasury. In 1981, the U.S. film and television industry brought back to our country almost $1 billion in surplus balance of payments. The American movie is the one U.S. made product that even the Japanese, skilled beyond all comparison in their conquest of world trade, are unable to compete with, displace or clone.

THE CRITICAL ISSUE: IF WHAT YOU OWN CANNOT BE PROTECTED, YOU OWN NOTHING

-- The central principle on which this issue hinges is this: The right of those who create television programs and feature films to own what they create. This is the fundamental principle embodied in copyright law. We are for individuals recording video and audio works in their homes so long as copyright owners of motion pictures, television programs and musical works are compensated for the taking of their property.

THE 9th CIRCUIT COURT OF APPEALS DECISION IN THE BETAMAX CASE

-- The 9th Circuit unanimous decision was lucid, unambiguous and consistent. In the case of Universal City Studios v. Sony Corporation of America the court found that the Copyright Act of 1976 did not provide a specific exception for home video recording and such recording does not fall within the general "fair use" exception to the use of copyrighted material established in the 1976 Act.

-- The day following the Ninth Circuit's decision, however, legislation was introduced to overturn the court by creating a home use exemption from copyright infringement for videocassette recording. These bills are seriously deficient because they fail to recognize the property rights of the creators, they fail to compensate the owners of copyrighted programs for an unjust taking of their property and they fail to understand that the public interest will be ill served by this legislation because it will surely diminish the quantity and quality of programs on "free" television.

THE CASE FOR COMPENSATION TO CREATIVE PROPERTY OWNERS

-- Eight out of ten films do not recoup their investment from theatrical exhibition and six out of ten films never recoup their total investment. Motion picture investment is a high risk business which depends for its survival on the viability of four distinct after-theater markets.

- Prerecorded cassettes and discs
- Pay cable and pay television
- Network television
- Syndicated television

-- In order to recoup investment costs, producers of motion pictures depend on these critical after-theater markets. It is these very markets which are most susceptible to VCR usage.

-- Most VCR owners (75%) "library" home-taped programs with the average number of videocassettes owned per household being 26.8.

-- With respect to "time shifting," less than 25% of the VCR-owner households own only from 2 to 7 cassettes, a number more than sufficient for "time shifting." The vast majority (86.8%) reported that they "skipped commercials or erased them while recording television programs." An even higher percentage (94.8%) said their VCR was equipped with a "fast forward" and/or "pause" feature which facilitates commercial deletion while recording or playing back a recording of a commercial television program.

-- The future impact of these practices by millions of VCR users on after-theater markets is clear and understandable: Those who invest in and own copyrighted films will be unable to rely on these markets to recoup their investments when hundreds of millions of copies are made.

-- A significant loss of revenue to the producers of programs shown on television will result because advertisers will not pay high rates for large audience shares when they realize that commercials are systematically deleted due to VCR use. VCR manufacturers deliberately design their machines so that VCR owners can use "pause" features to delete commercials while recording programs and "fast forward" features to skip commercials while viewing programs they have recorded. There is also widespread promotion of automatic electronic commercial killers. The VCR allows more viewers to watch programs without commercials.

-- Without a compensation mechanism, creators will have less incentive to create quality films and producers of programs will be far less willing to take financial risks to make innovative programs of excellence.

-- By 1990, one-third of Americans will either not have access to cable or not be able to afford it. By 1990, two-thirds of Americans will not have video machines. These Americans, many of whom will be less affluent, will continue to depend on free television for their home entertainment. But if unlicensed machines can devour property belonging to others, that market place soon will become a wasteland filled with game shows and other inexpensive programming. The producers of the most entertaining programs, the best that is created, will be reluctant to confront an unleashed machine with an insatiable appetite for swallowing copyrighted programming.

-- The many thousands of men and women organized in guilds and unions who are the backbone of the American film industry will also be harmed if legislation were adopted providing a home video exemption without compensation. Those on the other side of this issue often distort the role of laborers and craftsmen who depend on the film industry for work. Those who are manufacturing and importing VCRs to the U.S. are reaping substantial and growing profits from a device which people want to buy in order to tape programs shown on television. It would be wrong and terribly unfair to neglect the interests of those who work in the motion picture industry.

A SOLUTION TO PRESERVE THE AMERICAN COPYRIGHT AND A VALUABLE U.S. TRADE ASSET: HOME RECORDING LEGISLATION

-- Legislation introduced by Senators Mathias, Baker, Stevens, Byrd and Cranston, Amendment 1333 to S. 1758, cosponsored by 11 other Senators offers a realistic compromise which is equitable to all parties, permits the law to keep pace with technology in a manner not violative of the Constitution and will not result in increased costs to the government.

THE HOME RECORDING ACT OBEYS THE CONSTITUTION

-- Constitutional scholars confirm that if the Congress merely overturns the 9th Circuit's decision without fair and just compensation to copyright owners, that law will be unconstitutional. This view is held by Laurence H. Tribe, Professor of Constitutional Law of the Harvard Law School, who has written a memorandum dealing specifically with the issue of constitutionality of legislation reversing the 9th Circuit's ruling.

FALLACIES ABOUT COPYRIGHT PROTECTION AND HOW THE FALLACIES COLLIDE WITH FACT

-- The Congressional debate has caused the opponents of the Mathias-Edwards proposals to deal in simplistic arguments, and, in some instances, just plain misstatements. There are eleven fallacies refuted from pages 31-49.

-- One of the most significant fallacies alleges that the royalty fee is a "tax" that will be paid by consumers. The economic consulting firm of Robert R. Nathan & Associates of Washington, D.C. examined in detail the consumer marketplace and the impact of a copyright royalty fee on the ultimate selling price of the VCR and blank tape. The two basic conclusions of the Nathan firm are:

  -- It is likely that conditions prevailing in the markets for the VCR equipment and blank videocassettes will be such from the time any copyright royalty fee is imposed through the remainder of the decade that very substantial portions of any fees will be borne by manufacturers and retailers rather than passed on to consumers.

  -- As the market for VCR equipment and tapes matures, consumers will become increasingly sensitive to price changes and progressively smaller portions of any fee will be passed on to consumers through higher prices.

BUT NONE OF THE COPYRIGHT FEE OUGHT TO BE PASSED ON BY THE JAPANESE MANUFACTURERS:

-- The six Japanese companies that manufactured all the VCRs exported to the U.S. in 1981 made $2.8 billion in NET profits. In 1982, their profits are expected to rise to $3.1 billion. If there is, say, a $50 fee on the video machines, the Japanese could easily absorb this fee, and pass none of it on.

CONCLUSION: THE RIGHT OF CREATIVE PROPERTY OWNERS TO BE PROTECTED BY UNLICENSED USE OF THEIR PROPERTY

-- The U.S. film and television industry is not looking for any "sweetheart deals." We are asking for no favoritism nor do we tug at your lapel to grant us some special privilege. All we want is the same fair treatment that other property owners in the land find fixed in their daily transactions.

-- We are supporting a Congressional measure which is an intelligent compromise, a sensible alternative to summarily reversing a court of appeals decision and thereby risking abuse of the Constitution for disallowing what the Fifth Amendment makes so plain.

-- It is not in the public interest that a new technology suddenly thwart the creative community of this country in its efforts to bring enjoyable entertainment to American homes.

My name is Jack Valenti.

I am the President of the Motion Picture Association of America and represent the following companies:

Columbia Picture Industries, Inc.
Walt Disney Productions
Embassy Communications
Filmways Pictures
Metro-Goldwyn-Mayer Film Co.
Paramount Pictures Corporation
Twentieth Century Fox Film Corporation
United Artists Corporation
Universal Pictures, a division of Universal
 City Studios
Warner Bros. Inc.

I am also the Chairman of the Board of the Alliance of Motion Picture and Television Producers, and in that capacity speak for the following enterprises:

Universal City Studios, Inc.
Warner Bros. Inc.
Twentieth Century-Fox Film Corp.
Columbia Pictures Industries, Inc.
Paramount Pictures Corp.
Walt Disney Productions
Aaron Spelling Productions
Mary Tyler Moore Enterprises, Inc.
Leonard Goldberg Co.
Tandem/Embassy Communications Co.
Metro-Goldwyn-Mayer/United Artists

On behalf of the companies I represent, I wish to tell you of our vigorous support for Amendment No. 1333 to S. 1758, the Home Recording Legislation of 1982, introduced by Senator Charles McC. Mathias and co-sponsored by 15 of his colleagues, including Senators Howard Baker, Robert Byrd, Ted Stevens, and Alan Cranston.

Joining with the MPAA in support of this testimony on Amendment No. 1333 is a diverse group of organizations collectively called "The Coalition to Preserve the American Copyright." The Coalition now has 18 member groups including:

-- Children's Television Workshop
-- Volunteer Lawyers for the Arts
-- National Association of Theatre Owners
-- Screen Actors Guild
-- Association of Talent Agents
-- National Cable TV Association

- -- International Alliance of Theatrical Stage Employees and Moving Picture Operators of the U.S. and Canada
- -- Producers Guild of America, Inc.
- -- CBS, Inc.
- -- Authors League
- -- Writers Guild of America
- -- Training Media Distributors Association
- -- Directors Guild of America
- -- Actors Equity Association
- -- AFTRA
- -- National Association of Broadcasters

Not formally part of the Coalition to Preserve the American Copyright, but strongly supporting Amendment No. 1333, is the AFL-CIO's Department for Professional Employees.

All of these organizations believe that the laws that are in place to protect copyright must be kept effective in the face of new technologies. The Coalition has firmly endorsed the principle that copyright owners must be compensated if recording of copyrighted programs for use in the home were allowed.

AN EXPLANATORY NOTE

Nowhere in this testimony is there any reference to the need for relief of the audio industry as provided in Amendment No. 1333. My testimony is concerned solely with the video portions of the bill because I am confident that experts from the audio industry will offer this Committee a full summary of the reasons why the owners of copyrighted audio works should likewise be protected from the erosion of their property rights.

THE U.S. FILM AND TELEVISION INDUSTRY IS A HUGE AMERICAN ASSET WHICH MUST BE PRESERVED

The U.S. film and television industry is a great national asset.

Thousands of men and women, craftsmen, artisans, creative workers with varying and special skills who labor without notice-able applause from a public enchanted with the stories they tell on film and tape are part of this American enterprise.

It is an enterprise that stretches from California, in this city where these hearings are being conducted, to New York and every state in the union where movies and television programs are produced on location.

From this busy American marketplace, investment decisions involving many millions of dollars are made to create entertainment programs seen by hundreds of millions of people not only in the United States but in more than 100 foreign countries. The American motion picture industry brings to life unique, creative imaginings which other nations cannot rival. That is why American movies dominate the screens of the world.

But this industry today faces a new and troubling assault on its economic vitality and future security from the home videocassette recorder (VCR) and its necessary companion, the blank video tape. This technology was first introduced in the United States from Japan in 1975. Now like a great tidal wave just beyond the shore line, this video recording machine and its tape threaten, profoundly, the life-sustaining protection on which the U.S. film and television industry depends: its copyright.

This industry forms a trade asset of significant and continuing value to the U.S. Treasury and makes a major contribution to the strength of the American economy. In 1981, the U.S. film and television industry brought back to our country almost one billion dollars in surplus balance of payments. The American movie is the one U.S.-made product that even the Japanese, skilled beyond all comparison in their conquest of world trade, are unable to compete with, displace, or clone.

This important asset is now in jeopardy. Unless Congress recognizes the right of creative property owners to be protected as all other owners of private property are protected, this valuable asset will be blighted. We ask nothing more than to be lawfully and justly compensated when our property is taken from us as is now occurring when several million VCRs tape copyrighted material without our permission. To codify such taking of private property as proposed in S. 1758 as originally introduced (as well as in H.R. 4808, H.R. 4794, H.R. 4783, and H.R. 5250) is not only unfair, it is unconstitutional. The answer to this problem is to link a fair and reasonable system of compensation for copyright owners to the privilege of marketing VCRs for home taping.

The video recording machine and its blank tape are on the threshold of an invasion into the American marketplace so massive we cannot adequately forecast its impact.

The Electronics Industry Association of Japan recently reported that:

-- Exports of VCRs from Japan in 1981 totaled 2.37 million machines, an increase of 130% over 1980.

-- The U.S. was by far the largest single market, accounting for nearly a third of worldwide sales.

-- For the first time, exports of VCRs to the U.S. on a volume basis exceeded Japanese color TV receiver exports.

By 1990, the best estimates are that Japan will have exported to the U.S.A. some 35-38 million VCRs. Moreover, in that year VCR owners are expected to purchase between 225-300 million blank videocassettes for home taping.

These statistics emphasize the growing and dangerous intrusion of this new technology. But it is critical to understand that the creative property of U.S. film makers and television programmers is the true consumer appeal, for without copyrighted programs to tape, these machines and blank cassettes would be virtually useless. The principal function of these machines is to capture on tape what belongs to others, without their permission and without compensation to the owners of programs.

THE CRITICAL ISSUE: IF WHAT YOU OWN CANNOT BE PROTECTED, YOU OWN NOTHING

The central principle on which this issue hinges is this: The right of those who create television programs and feature films to own what they create. This is what is embodied in copyright law.

If what you own cannot be protected, you own nothing. That is the dominating theme of this issue. Though we will discuss many elements injected in the debate, everything else is irrelevant, mere tracings on dry leaves in the wind.

If one believes otherwise, you accept the premise that anyone can use what belongs to others without the owner's permission or just compensation. Does any American who owns anything -- a home, an automobile, a videocassette recorder -- truly believe that?

Nothing of value is free.

It is very easy to convince people that the public interest is served when someone else's property can be had for free. But even the most guileless among us know this is a cave of illusion where common sense is lured, and then quietly strangled.

THE NINTH CIRCUIT COURT OF APPEALS DECISION IN THE BETAMAX CASE

The Ninth Circuit's unanimous decision was lucid, unambiguous, and consistent. What this Court said should be examined carefully by this Subcommittee. In the case of

Universal City Studios v. Sony Corporation of America, 659 F.2d 963 (1981), reh'g en banc denied (9th Cir. 1982), the court found:

> The Copyright Act of 1976 did not provide a specific exception for home video recording. In fact, the court observed that the legislative history of the 1976 Act " . . . [p]rovides strong support for the conclusion that Congress was concerned about unauthorized reproductions of audiovisual works whether or not such reproductions were for profit." Id. at 967.
>
> . . . Home video recording does not fall within the general "fair use" exception to the use of copyrighted material established in the 1976 Copyright Act. The Act established four general guidelines for determining the judicial application of the doctrine. The Court of Appeals examined each of these and found that " . . . [t]he fair use doctrine does not sanction home video recording." Id. at 971.

The court also held that the use of the VCR prejudiced the sale of entertainment programs when it said:

> It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market." Id. at 974.

However, on the day following the Ninth Circuit decision, legislation was introduced to overturn the court by creating a home use exemption from copyright infringement for videocassette recording.

These bills are seriously deficient because:

-- They fail totally to recognize the property rights of the creators and owners of copyrighted movies and other programs;

-- They fail to compensate the owners of copyrighted programs for an unjust taking of their property, thus clearly violating the Fifth Amendment to the Constitution;

-- And they fail to understand the "public interest": the public will be victimized because the stream of programs delivered to their homes via television and cable will surely diminish in quantity and quality. The public will be the loser. Whoever claims otherwise deludes the American people.

The following summary of Media Statistics, Inc., (Mediastat) results confer upon this issue a clear and penetrating light. This survey should be studied with more than casual attention. It was done under normal marketplace conditions and undertaken by a skilled and professional organization in the electronic media research business. It was not commissioned by MPAA and we have no financial interest in the company which conducted the survey. We paid a fee like any other subscriber to have access to its results after it was completed.

These statistics clearly make visible that home taping is considerable, that "libraryìng" or retention of programs for future viewing is a fact of taping life, that the value of advertisements, the lifeblood of commercial television, will be severely eroded because of the technical means to erase or skip over them and the widespread practice of doing so.

On the market today are gadgets known as THE KILLER and THE EDITOR which are capable of electronically deleting commercials from home recordings in the process of taping.

In a short time, the technology will allow such electronic "marauders" to be incorporated within the VCR itself so that it is an integral part of the video machine.

Thus, unless the Congress acts now, an indispensable U.S. foreign trade asset and the domestic television industry will be crippled by machines and tapes that devour that which does not belong to them.

MEDIASTAT

MEDIA STATISTICS INCORPORATED · 8120 Fenton Street · Silver Spring, Maryland 20910

SUMMARY 1981 VCR REPORT

prepared for

COALITION TO PRESERVE THE AMERICAN COPYRIGHT

The data summarized below are based on one-week diaries filled out between September 10 and October 17, 1981 by 250 videocassette recorder owners. Some 40,000 homes were screened to locate these VCR owners.

MOST VCR OWNERS "LIBRARY" HOME-TAPED PROGRAMS

1. The average number of videocassettes owned per household was 26.8. (Of the 250 households, 9 reported ownership of 100 to 800 cassettes.)

2. Of the 26.8 cassettes, 19.8 consisted of recordings made by the VCR owner or "a friend." Only 2.7 were purchased by the VCR owner as pre-recorded cassettes.

3. The sample of 250 VCR households made 650 recordings during the diary week, an average of 2.6 per household. Of the 650 recordings, 193 were classified as "movies," 264 as "television series," and the balance as "TV specials."

4. Among VCR-owning households, 52.4% said that they trade videocassettes with other VCR owners. About one out of three (31.2%) said they make copies of cassettes owned by others.

5. Only 24% of VCR owners indicated that they planned to buy pre-recorded cassettes. In contrast, 75% reported that they record broadcast and pay-TV programs for their permanent collections.

WITH RESPECT TO "TIME SHIFTING" ....

6. Less than 25% of the VCR-owner households own only from 2 to 7 cassettes, a number more than sufficient for "time shifting."

7. The vast majority (86.8%) reported that they "skip commercials or erase them" while recording television programs. An even higher percentage (94.8%) said their VCR was equipped with a "fast forward" and/or "pause" feature, which facilitates the deletion of commercials while recording or playing-back a recording of a commercial television program.

VCR OWNERS ARE "UP-SCALE" WITH RESPECT TO INCOME, EDUCATION, AND OCCUPATION

8. The median income of VCR owner households is in the $35,000 to $50,000 range. Only 11.2% reported household incomes of less than $25,000. More than one-third reported incomes in excess of $50,000.

9. Four-fifths of "heads of households" had attended college. 17.6% had Masters degrees and another 8.0% had earned Doctorates.

10. Heads of a majority of VCR-owning households were either "professional/technician" (40.4%) or "manager/official" (33.2%).

11. VCR households are much younger than the U.S. average. Only 8.2% of the persons in VCR households are in the "55 years or older" category compared to 21.3% in all television households.

12. 35.6% of the VCR-owning households subscribe to cable and/or pay television -- about twice the average in the 15 markets surveyed.

THE CASE FOR COMPENSATION TO CREATIVE PROPERTY OWNERS

Passage of legislation which provides an exemption for home video recording without compensation will adversely affect four distinct groups: copyright owners, the public at large, broadcasters, and those who work to create films.

First, those who own copyrighted works, such as the American film industry, will be seriously harmed.

The full extent of this problem cannot be understood without a brief explanation of the economics of the motion picture business.

Motion picture investment decisions are made today recognizing that:

-- The average total investment in a motion picture is some $20 million.

-- Eight out of ten films do not recoup their investment from theatrical exhibition.

-- Six out of ten films never recoup their total investment, period.

These stark facts define the high risk business of producing motion pictures. They mean one thing and only one thing: those who invest in movies must look to after-theater or secondary markets to stay in business.

What are these markets?

There are several after-theater markets to which films and programs are licensed by the copyright owner. The operative word is "licensed." Keep close in your mind the licensing procedure. Unlike many products, in other areas, when a theater licenses a film to exhibit to the public, the viewer does not take home the tangible print nor does the theater own a copy of the film. Consumers pay to see the film; they purchase the right to enjoy a movie.

Other markets are similarly licensed, usually for multiple showings. They include:

Pay cable and pay television

and

Network television

and

Syndicated television, licensing to individual television stations.

Pre-recorded cassettes and discs are not part of the compensation being considered in the legislation before you. The copyright fee is included in the purchase price and/or rental charge.

However, not all programs are usable in these secondary marketplaces. As I have indicated earlier, most motion pictures do not generate revenues sufficient to cover the investment necessary to produce and market the film. The films which do penetrate these after-theater markets are, in effect, subsidizing the vast percentage of movies which lose money because they simply don't attract a wide enough audience. No one deliberately sets out to make a film of slender public appeal. No one wakes up in the morning and says, "Today, I'm going to make a film that will not recoup its costs." It is part of the daily risks, both in creative labor and money invested, that is the lot of those who try to entice audiences to see what they have created.

One does not have to be trained in sophisticated marketing and creative judgment to understand the devastation on the after-theater marketplace caused by the hundreds of millions of tapings that will adversely impact on the future of the creative community in this country. It is simply a question of basic economics and plain common sense.

Consider this, and remember that the unharnessed and unlicensed taping of creative property can shatter the potential life of programming -- unless Congress acts now to compensate the creative property owner for the loss of his secondary markets from the widespread use of the VCR.

-- Why would you buy a movie on a pre-recorded videocassette for $60-80 when you can record two to three full-length movies at home on one blank tape which costs, according to the Home Recording Rights Coalition, anywhere from $12-20? The answer is you would not and this is why sales and even rentals of pre-recorded cassettes will surely be eroded by VCR use.

-- Why would you subscribe to cable or pay television if your neighbor, relative or friend paid for this service and you could borrow or swap all of the tapes of movies you wanted? The answer is you would not, and this is why cable and pay TV subscription revenues and thus licensing fees for movies in this market are expected to decline with expanded VCR usage.

-- Why would you watch regular television broadcast programs when you could play a program of your choice without commercials on your VCR instead? The answer is you would not, and this is why our revenues from films shown on networks and syndicated television will be dramatically reduced as VCRs are placed in millions of American homes and prime time audiences shrink.

-- Why would you watch a commercial included in a program recorded off-the-air if you could either erase it, eliminate it with a remote control fast forward device or totally omit its recording automatically with new "commercial killer" technology? The answer is you would not, and these practices will substantially diminish the value of films in the network and syndicated markets.

The future impact of these practices by millions of VCR users on our after-theater markets is clear and understandable: Those who invest in and own copyrighted films will be unable to rely on these markets to recoup their investments when hundreds of millions of copies are made. What will copyright owners do in response to this situation?

The answer to that question relates directly to the viewing public, which will clearly be harmed if a home video exemption without compensation becomes law.

I am not suggesting that film producers will go out of business. But I am most unmistakably saying that film producers will surely change the way they are doing business.

They will be forced to contain the exhibition of their films within those markets -- theaters and pre-recorded cassettes -- where they are able to control the for-profit uses of what they own.

If this were to occur, the viewing public would have substantially less access to quality audiovisual programming on broadcast television. This would happen as a result of a combination of several factors related to the economics of the motion picture industry.

Without a compensation mechanism, creators will have lessened incentive to create quality films and producers of programs will be far less willing to take financial risks to make innovative programs of creative excellence. I am not saying that only expensive films are good films. I am saying that even "low budget" films today are in the multimillion dollar category. However, for both types of films, there must be strong economic incentives and a marketplace which provides many options for return of revenues in order to offset the risks for those who invest. The uncompensated loss of after-theater markets will diminish the incentive to create and highlight the risk of financial failure for all types of films. The result will inevitably be fewer quality films.

Resident within this logic is a potentially explosive public policy issue of great importance to the Congress. It is, without sounding apocalyptic, a political time bomb.

By 1990, one third of Americans will either not have access to cable or not be able to afford it. By 1990, two-thirds of Americans will not have video machines.

These fellow citizens will be the less comfortable, the less affluent, those who cannot afford to buy $1,000 machines and furnish them with tapes and those who cannot afford the cable fee.

These lower-income Americans will continue to depend on free television -- the networks and local independent TV stations -- for their home entertainment. But if unlicensed machines can devour property belonging to others, that marketplace soon will become a wasteland filled with game shows and other inexpensive programming. The producers of the most entertaining programs, the best that is created, will be reluctant to confront an unleashed machine with an insatiable appetite for swallowing copyrighted programming.

Even the affluent will find home viewing disappointing. They will have less quality programming to tape on their expensive video machines.

This is a fair assay of the future which public officials must seriously ponder.

It is impossible to separate the creative process from the economics of the film industry. When the latter is altered, the former will be sorely affected.

In recent testimony before the Senate Judiciary Committee, Mr. Joseph Waz, Deputy Director of the National Citizens Committee for Broadcasting, commented on this phenomenon:

> Copyright is the mechanism by which we assure a continued flow of video productions to the marketplace. While it is desirable that as many Americans as possible should benefit from the wonders of video, it is unrealistic to think that these wonders emerge from some inexhaustible source. If video artists and producers do not perceive opportunities to benefit fairly from the use and enjoyment of their products, they will be disinclined to create them.
>
> If there is a demonstrable loss to artists and producers as a result of home video recording, and if this loss is so significant as to endanger the wealth of viewing options available to Americans, then the public interest cannot be served by permitting home recording without some suitable compensation to holders of copyrights.

Broadcasters are another group which would be harmed by a Congressional reversal of the Ninth Circuit's decision without a mechanism to compensate owners of copyrighted works.

Television broadcasters face a shrinkage in advertising revenues attributable to factors related to VCR use.

VCR manufacturers deliberately design their machines so that VCR owners can use "pause" features to delete commercials while recording programs for their home libraries and "fast forward" features to skip commercials while viewing programs they have recorded, including "time shift" tapings.

We are also seeing widespread promotion of automatic electronic commercial killers as indicated earlier. The technology to perfect and commercialize these devices is as predictable as the Japanese entrepreneurial spirit that has made the VCR such a profitable product today.

The use of the VCR means that more and more viewers will watch a commercial free VCR-made copy instead of a network broadcast.

If someone has a copy of a movie at home and is able to choose between watching that copy free of commercials and a television program interrupted by commercials, can there be any question as to what he will choose? Viewers lost to prime time television are not watching programs and commercials. Broadcast advertising revenues will certainly decrease as advertisement viewing predictably declines among 30 million to 40 million VCR households in 1990.

Without compensation from a copyright royalty fee, broadcasters stand to lose access to high quality programming, since copyright owners will be reluctant to release their best products to broadcast television. If broadcasters are forced to show mainly those programs with minimal viewer appeal -- the programs least likely to be taped (or viewed) -- advertisers will not pay substantial sums for prime time commercial slots.

There is another group to be harmed if legislation were adopted providing a home video exemption without compensation: the many thousands of men and women organized in guilds and unions who are the backbone of the American film industry.

It is these people who create motion pictures through their talent, hard work, and pursuit of excellence. It is these people who have built a unique American trade asset. It is these people who must depend on the basic health of their industry for economic security. And it is these people who would benefit from copyright royalty mechanisms as a result of contractual agreements with film producers.

We are meeting today a long way from Washington. Regrettably, there is a misperception in Washington that only stars make movies. Those familiar with our industry know that while famous actors and actresses appear on the screen, there are thousands of people working behind the scenes to create motion pictures and programs for television. To be sure, Hollywood seen from Washington is glamorous and exciting. But the Hollywood hurt most dramatically by home video recording will not be the Hollywood of the stars. It will be the Hollywood of the stage hands, electricians, grips, carpenters, seamstresses, film editors, and all other skilled workers involved in the film production process. These people are not besieged by fans. They are ordinary, hard working people who deserve the same consideration from Congress for their basic contribution to our economy as is given steelworkers, autoworkers, coal miners, farmers, all Americans who work for a living. Do not forget this fact or these people. Those on the other side of this issue often distort the role of laborers and craftsmen who depend on the film industry for work.

Those who are manufacturing and exporting VCRs to the U.S.A. are reaping substantial and growing profits from a device which people want to buy in order to tape programs shown on television. It would be wrong and terribly unfair to neglect the interests of those who work in the motion picture industry.

A SOLUTION TO PRESERVE THE AMERICAN COPYRIGHT AND A VALUABLE U.S. TRADE ASSET: THE HOME RECORDING LEGISLATION OF 1982

Those who have spent years in the political arena are often constrained to observe, when confronting a difficult issue, how few are the alternatives available, and how meager are the opportunities to enlarge them.

Providentially, this issue has a most suitable alternative that is founded in good sense and coincides with the Constitution's commands.

The legislation introduced by Senators Mathias, Baker, Stevens, Byrd, and Cranston (Amendment 1333 to S. 1758) which is cosponsored by 11 other senators, and by Congressman Edwards (H.R. 5705) with 60 co-sponsors offers a realistic compromise which is equitable to all parties, permits the law to keep pace with technology in a manner not violative of the Constitution and will not result in increased cost to the government. The Mathias amendment, known as the Home Recording Legislation of 1982, permits home use of audio and videocassette recorders and protects the property rights of authors and entrepreneurs in their creations. It achieves these dual goals with six key provisions:

> First, it provides an exemption for individuals from any liability for infringement of copyright if the audio or video recording is made for private use of family members and others in their immediate household;
>
> Second, it requires that importers or manufacturers of audio and video recording devices and audio and video tapes register with the U.S. Copyright Office and thereafter on a semi-annual basis deposit with the Register of Copyrights information relating to the number of recorders and blank tapes imported, manufactured and distributed;

> Three, it directs the Copyright Royalty Tribunal to determine appropriate and reasonable royalty fees to be paid by the manufacturers and importers who distribute audio and video recorders and tapes in order to provide copyright owners of motion pictures, other audiovisual works and musical works, fair compensation for the use of their creation;
>
> Four, it establishes a system for the distribution of the royalty fees to copyright owners on a yearly basis through the Copyright Royalty Tribunal;
>
> Five, it imposes penalties for violation of these provisions consistent with existing copyright law; and
>
> Six, it allows owners of (1) phonorecords of sound recordings or (2) copies of motion pictures or other audiovisual works to dispose of such phonorecords or copies by rental, lease or lending for commercial advantage, only with the permission of copyright owners. This is called the "fair marketing" amendment.

The purpose of the fair marketing amendment is simple and direct: It is in the interest of producers of prerecorded video tapes and phonorecords that consumers have a choice between rental or purchase of these products at reasonable prices. That element of choice is being eroded by a copyright concept, known as the "first sale doctrine." This doctrine allows retailers to buy prerecorded tapes and rent them countless times without justly compensating copyright owners for these uses.

As you can well imagine, this practice is badly distorting the market in ways harmful to both consumers and entertainment producers.

-- The rental market is predominant in the prerecorded videocassette industry, and we believe the entire industry would benefit from an amendment promoting competition in the marketplace which would thus enable the software companies to continue to provide products at reasonable prices for consumers, and at the same time, provide the opportunity for retailers and distributors to prosper.

-- Anything which undermines these secondary markets also detracts from the copyright owner's ability to produce high quality programming in the face of escalating costs (average cost of a motion picture, including prints and advertising, is $20 million) and the high risks endemic to this industry (6 out of 10 films never recoup their investment).

-- Producers of prerecorded tapes are faced with a severe dilemma: either refuse to make such tapes available for sales to the consumer or raise the sale price of prerecorded tapes to retailers to anticipate retailers' rentals to consumers.

-- Small retail stores with limited capital want the flexibility to sell and rent prerecorded videocassettes. When available for sale, the artificially increased price of these items may force small stores to limit their inventories. This means fewer titles available for sale to consumers and a less profitable business.

-- The cost of producing prerecorded video tapes is beginning to fall. The natural decline in retail prices will be slowed severely if copyright owners have to "add on" costs to recover the inevitable losses which result from the marketing abuses to which they are now subject.

The fair marketing provision will provide a more open and competitive marketplace by eliminating free market barriers. When both rentals or purchases by consumers of prerecorded videocassettes are fostered, prices will go down quicker. The public will have greater access to a variety of entertainment programs and options to buy or rent.

In creating a home video exemption and combining it with a system for compensating copyright owners for the use of their work and by correcting the distorted rental market, the Home Recording Legislation can claim one of the basic objectives of American copyright law: providing incentives for the creation of intellectual property. It is only through such incentives that our nation has maintained its worldwide creative dominance in the program production industries. It is only with such incentives that these industries contribute almost one billion dollars annually favorable to our balance of trade. The export market for these American creative products continues to expand as American entertainment programs dominate world screens.

THE HOME RECORDING LEGISLATION OBEYS THE CONSTITUTION

The Home Recording Legislation of 1982 is necessary to protect an enormous American asset, its creative community. It is congenial to the spirit of fair play. It is a compromise approach to complex legal and legislative problems and thoroughly hospitable to the Constitution itself. I cannot emphasize this latter fact too firmly.

Article One, Section Eight, Clause Eight, of the Constitution empowers Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." The Congress has a clear and unmistakable responsibility under this section as it deals with the issue we discuss today.

Constitutional scholars confirm that if the Congress merely overturns the Ninth Circuit's decision without fair and just compensation to copyright owners, that law would be unconstitutional.

This view is held by Laurence H. Tribe. Professor of Constitutional Law of the Harvard Law School, who has written a memorandum dealing specifically with the issue of the constitutionality of legislation reversing the Ninth Circuit's ruling.

(I ask that Professor Tribe's paper be included in the official record of this hearing.)

Professor Tribe cogently made the following points in his constitutional analysis which I specifically urge the Committee to consider and which I will summarize:

-- Allowing VCR owners to copy freely by the means of an exemption from copyright infringement without creating a mechanism to compensate copyright owners takes from the owners the very essence of their property: the exclusive right to control who may use their work, that is, who may copy it and thereby profit from its reproduction.

-- For two basic reasons, Congress may be forbidden to take such copyright owners' property even if Congress is willing to pay to do so. First, the takings clause is a limitation on the power of Congress, not an independent grant of authority. Second, regardless of Congress's source of authority, the takings clause permits government to take property only when the taking serves a public purpose. A careful examination of the bills introduced reversing the Ninth Circuit appear to satisfy neither of these prerequisites. By compensating copyrightholders, Congress would better ensure that the proposed exception to copyright laws will not be found unconstitutional as a private taking.

-- The most basic element of personal "property" is the right to exclude others from its use without its owner's permission. The fact that copyrights are intangible does not deprive them of their nature as species of property.

-- The Supreme Court has not allowed government to significantly impair the value of important property rights -- to "take" property -- without compensation except only in the most limited and extreme circumstances. It can hardly be doubted that there is no remotely comparable emergency that would sustain

Congress's taking of the property owned by current copyrightholders of works which are broadcast by television.

-- Finally, Professor Tribe believes that the view that the public "owns" the airwaves and therefore Congress may not secure copyrights that conflict with the public's First Amendment rights to hear as well as to speak, has been routinely and rightly rejected by the courts. The Constitution commands Congress not to abridge freedom of speech, but it also permits Congress to protect copyrights. The removal of copyright protection would itself endanger First Amendment values. It seems obvious that motion picture and television producers will speak less if the reward for their efforts is greatly reduced.

I also want to point out that the Ninth Circuit dealt severely with claims made by Sony that because the "public airwaves" was the method of transport, taping in the home was legal since anything going over the public airwaves is fair game for anyone who chooses to intercept or tape the program because that constituted "fair use." Said the Ninth Circuit:

"We fail to see how the method by which appellants have chosen to distribute their works is relevant to this factor of the fair use analysis." 659 F.2d 963, 972 (9th Cir. 1981).

FALLACIES ABOUT COPYRIGHT PROTECTION -- AND HOW THE FALLACIES COLLIDE WITH FACT

This Congressional debate has caused opponents of the Mathias Amendment to deal in simplistic arguments, and, in some instances, just plain misstatements.

The non-truths, which I will call "fallacies," are not really connected to the central issue of creative property rights but they cloud the Committee's consideration of the legislation before it. Lest any member of this Committee or your colleagues in the Congress find some of these fallacies attractively packaged and, therefore, susceptible to belief, let me outline some of them and lay bare their shortcomings.

FALLACY #1: The film industry's true objective is to prohibit the use of videocassette recorders.

THE TRUE FACT: Executives of the motion picture industry have testified before the Senate and have persistently informed members of the House that they do not oppose a home video exemption as long as it is linked to fair compensation. Moreover, the Ninth Circuit suggested that the solution to the VCR's illegal intercepts of television programming could be a continuing royalty.

FALLACY #2: VCR owners should be concerned lest the decision of the Ninth Circuit endanger their right to privacy.

THE TRUE FACT: This is another example of "scare tactics" aimed at frightening consumers into believing what is not and never was. First, the passage of the Mathias Amendment will clearly insure the use of VCRs in the home without copyright infringement. Second, even without this legislation, the copyright owners in the Sony case publicly announced they have never intended any kind of enforcement through actions against individual home owners.

FALLACY #3: The Betamax decision makes criminals of consumers who now own a VCR.

THE TRUE FACT: This charge displays either ignorance of or disregard for copyright law. The act of copyright infringement is not criminal unless it is done "willfully and for purposes of commercial advantage or private financial gain." 17 U.S.C. Section 506(a). It is so very obvious that the private use of a VCR does not fall into the criminal provisions of the Copyright Act.

FALLACY #4: The film industry is "greedy" and wants more and more profits from VCRs even though the film producer is already "dipping" into other markets to recoup his investment.

THE TRUE FACT: This charge is so riddled with absurdities that I hardly know where to begin. It is intemperate of opponents to charge American producers with "greed" when the Japanese companies exporting VCRs are swollen with profits, largely derived from the American market for their new products.

On February 24, 1982, THE WALL STREET JOURNAL published an article on Matsushita Electric Industrial Company, the largest producer of VCRs in Japan. Said the JOURNAL: "Matsushita, aided by strong demand for its videotape recorders, reported record results for its fiscal fourth quarter . . . . net income rose 33% to the equivalent of about $198.8 million from $150 million a year earlier . . . VCRs posted the healthiest sales gain of all Matsushita's consumer products, surging 80%, overseas sales up 89%, to $2.26 billion."

Note this company is now making the equivalent of almost $1 billion a year in NET profits, with VCRs the biggest contributor to the net. Is Matsushita "greedy" because its earnings, its net earnings, are up 33% over last year? It is an interesting sidebar to note that this one Japanese company is reporting net profits greater than the net profits of the entire U.S. film production industry.

The second part of the charge, that film producers are already recovering their investment from other markets and, therefore, should not seek to gain any revenues from the home taping market, has comic overtones.

By this same tortured logic, should Sony, once it has recovered its investment from the sale of VCRs in the U.S.

market, offer the machines for free in the European market? Is any enterprise in America to cease its quest for revenues once it has recouped its investment on whatever product it offers for sale?

But this charge has one further defect. It is wrong. As I outlined earlier, 8 out of 10 movies never recoup investment from theatrical exhibition and 6 out of 10 films never recoup their costs.

This charge by the opposition raises effrontery to a new level of artistry.

FALLACY #5: VCRs are used primarily for time shifting rather than library building and this presents no harm to the film industry; indeed, it enlarges copyright owners' revenues.

THE TRUE FACT: This accusation has a forked tongue since it encases within one charge two misstatements.

First, as the Mediastat survey pointedly observed, library building is a dominant if not predominant part of VCR home taping behavior. Second, as we have cataloged earlier in the testimony, "time shifting" often involves commercial-killing and commercial-skipping which not only denies the advertiser the opportunity to have his message viewed, but also strips away the incentive for advertisers to use television and thereby fund programs which are exhibited in American homes, most of which do not own VCRs.

Most of all, it is important to go back to the bedrock of legal principle. Copyright infringement springs from unauthorized use. Harm is immaterial. The essence of copyright protection is control over the use of that property. When that control is eroded, the property value and protection of the copyright owner collapse.

FALLACY #6: Anything transported via the public airwaves is free to all.

THE TRUE FACT: The Ninth Circuit, as referred to earlier, nailed this canard to the wall when it wrote: "We fail to see how the method by which appellants have chosen to distribute their product is relevant. . . ."

Or to put it more pungently, no matter how your product travels, if one hasn't licensed it, one cannot use it.

What is the difference between public airwaves and public highways? Both are owned by the people, and both are pathways of transport, one used by electronic signals and the other by wheeled vehicles. But both signal and vehicle are man-made and man-controlled, and, therefore, subject to man-made laws. Protection for the property owner should be guaranteed however it is transported.

There seems to exist a presumptive belief that if something comes through your television set, you have the right to copy it as you see fit though you have no license to do so. This presumption accepts the notion that the property rights of others cease to exist within the confines of one's home. As the nation's leading authority on copyright, Professor Melville V. Nimmer, wrote: "Would anyone argue that I may destroy a book borrowed from a library if I do so within the four walls of my home?"

Property rights are not transitory, nor do they lose their primacy when they leave one environment and enter another. These are durable rights, made proof against the taking of the right by the force and firmness of the nation's copyright laws.

FALLACY #7: The royalty fee is a tax that will be paid in its entirety by consumers.

THE TRUE FACT: It is not a tax. If it were, it would go into the general revenue fund. It is a copyright fee, the same as fees deserved by the creators or the owners of other copyrights.

Moreover, in the fierce tangle of today's marketplace, it is likely that most of any royalty fee would be absorbed in the marketing chain before it reaches the consumer.

A survey of electronic stores in Washington, D. C., shows an astonishing $571 price disparity in the cost of a Sony SL-5600 videocassette recorder. The highest price at one store was $1,390 and the lowest price at a local discount establishment was $819. The same with a blank tape. The price gap was $8.00 for a Beta format L-750 with 4 1/2 hours of tape capacity. The highest price was $20.95 and the lowest was $12.95.

What this reveals is the clanging of the competitive bell. Those retail merchants who aim to pass along the fee placed on the manufacturer (if indeed the manufacturer elects to pass it on) will find competition undercutting his price. Such is the balancing mechanism of a free marketplace.

But we wanted even further evidence.

We asked the prestigious consulting firm of Robert R. Nathan & Associates (RRNA) of Washington, D.C. to examine in detail the consumer marketplace and the impact of a copyright royalty fee on the ultimate selling price of the VCR and blank tape.

The two basic conclusions of the Nathan firm are:

-- It is likely that conditions prevailing in the markets for the VCR equipment and blank videocassettes will be such from the time any copyright royalty fee is imposed through the remainder of the decade that very substantial portions of any fees will be borne by manufacturers and retailers rather than passed on to consumers.

-- As the market for VCR equipment and tapes matures, consumers will become increasingly sensitive to price changes and progressively smaller portions of any fee will be passed on to consumers through higher prices.

To arrive at these conclusions, RRNA closely examined the structure and competitive outlook for the VCR and blank tape markets. What they found totally demolishes the allegations by the Japanese manufacturers and their U.S. subsidiaries that a copyright royalty fee would unfairly burden consumers and that their industry would be seriously harmed by sucn a fee.

On the issue of competition in the VCR and videocassette industry, RRNA reported:

-- The industry has grown at an astonishing rate in the United States since its inception in the mid-1970s. The extremely high growth curve of the industry is comparable with those of color television sets and other innovative consumer electronic products.

-- The substantial numbers of manufacturers-licensees, coupled with striking technological breakthroughs, have led to an enormous variety of equipment and price options open to consumers.

-- There are numerous (perhaps over 100) manufacturers and suppliers of blank tapes. That there are so many suppliers of tapes in such a new industry is a strong indicator of a competitive market.

-- Pricing decisions of VCRs are made at a variety of points throughout the distribution channel, with the possibility for industry's absorbing at least some of the cost increase at each one. For example, in a chain of distribution made up of a manufacturer, distributor, and retailer, the costs of a royalty fee may be borne by all three as a VCR moves downstream in the channel, going through a series of buy-sell transactions, each with its own price.

-- As with equipment, there are several points in the distribution channel where transactions of tapes occur as they move downstream from manufacturer to wholesaler to retailer.

-- Data show that prices of VCR equipment have been steadily falling in tandem with increased sales, the proliferation of models of VCR equipment based upon continuous product innovation, and increases in the numbers of equipment suppliers.

-- An analysis of pricing of blank tapes shows that the market is price competitive, and prices are falling.

On the issue of profits by the manufacturers of VCRs and blank tapes, RRNA found:

-- The profits in the VCR industry are high, by virtually any measure.

-- Additional manufacturers are planning to enter the blank tape market. . . . Presumably, anticipated profits are providing the incentive for them to enter.

-- A survey of retail prices of VCR equipment shows vast differences in pricing by retailer. These discrepancies indicate some substantial profit margins are earned by retailers, despite price competition.

With respect to the future demand for VCRs and videocassettes, and the effect of these developments on price elasticity, the Nathan economists concluded:

-- Studies covering data for long periods of time of industries analogous to the VCR industry show that demand becomes more price elastic as these industries mature. There is no reason to think that the same phenomenon would not hold here. Indeed, anticipated developments in the industry are fully compatible with the expectation of greater price elasticity as was found in the color television industry.

-- Competition in both VCR equipment and tape markets will become keener over time, creating downward pressures on prices and allowing demand to become even more price elastic. Continued developments in the videodisc player industry, as well as increased production in the VCR industry itself, will enhance competitive pressures on prices and consequently on price elasticity of VCR equipment. Continued reduced prices of prerecorded movies, due both to anticipated high speed duplication technology and to the explosive growth in rental and exchange modes of marketing, along with the anticipated entry of new manufacturers will further increase the price elasticity of videocassette tapes.

Finally, for purposes of example, RRNA developed a scenario assuming a $1 royalty fee on blank tape and a $50 one-time fee on a VCR and analyzed their impact on consumer prices. When dealing with such a scenario, the economists found that:

- The proportion of increased costs through a royalty fee on VCRs found to be passed on to consumers through higher prices in 1984 is just over 21 percent (about $10.00); in 1990, it is approximately 12 percent (less than $5.00).
- The comparable figures for blank videocassette tapes are 20 percent (20 cents) in 1984; in 1990, the figure is about 12 percent (12 cents).
- The effect on consumer prices from passing on the portion of the royalty fee we have calculated in the scenarios is to increase them negligibly, between 1 and 2 percent.

FALLACY #8: The Copyright Royalty Tribunal is not equipped to handle a system for determining copyright royalty fees and distributing those fees.

THE TRUE FACT: The Copyright Royalty Tribunal is perfectly capable of carrying out these tasks. It is an organization already in place with no need to set up another agency.

This fact was recently confirmed by the District of Columbia Circuit Court of Appeals in its decision in *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, No. 80-2273, slip op. (D.C. Cir. Apr. 9, 1982). In a unanimous decision, the court upheld the Tribunal's 1978 cable royalty distribution, which is very similar in practice to the proposed home recording royalty fee system. Although the court acknowledged the difficulty of the task undertaken by the CRT, it held "that the Tribunal's resolution of the problem facing it was reasonable, that its decisional criteria comported with congressional intent, and that its distribution of royalty shares finds rational support in the administrative record." *Id*. at 36. Moreover, the court found that the procedural rights of all affected parties were adequately protected by the Tribunal's procedures. Id. at 15. Finally, the court noted that criticism of the CRT's practice has, in the main, been unwarranted: "agitation over the Tribunal's initial apportionment has been somewhat overstated." Id. at 37.

Thus, it is apparent that the Tribunal is ready, willing, and able to fulfill the duties required of it under Admendment No. 1333.

FALLACY #9: A copyright royalty fee could have a disastrous effect on sales of video machines and blank tapes.

THE TRUE FACT: The electronic industry wrung its hands in collective dismay in 1962 when the All-Channel Receivers Act was under consideration (this Act required that all television sets sold have both UHF and VHF receivers).

It is amusing, and instructive, to read from the record of March 5-6-7-8, 1962. Many of the same arguments made today by the electronics industry are lamentably similar to those made twenty years ago:

> "[The Committee should consider] what all-channel legislation will do to the consumer's pocketbook. The present average retail selling price for TV sets . . . is $212. This would be increased by $30 if any of the all-channel bills are enacted. This would mean, if the present sales level of 6 million sets a year could be maintained at the higher price, that the public would be paying $180 million more for television receivers annually. At least half the purchasers never would have occasion to use UHF tuners during the life of their sets."
>
> "[A] 14 percent price rise could bring 14 percent loss in business for a time at least, and many people might be thrown out of work. The drop in sales, meanwhile, could cost the Federal Government millions in excise taxes." 1/

1/ Statement of L. M. Sandwick, Staff Director, Consumer Products Division, Electronic Industries Association, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 87th Cong., 2d Sess., March 5, 6, 7, and 9, 1962.

> "Motorola is opposed to this legislation because an all-channel TV set, which will receive both VHF and UHF broadcasts, costs the consumer about $30 more that the VHF-only set. This price increase will have an adverse effect on the sale of TV sets."

> "[E]ach person who buys a TV set in the future may be compelled to pay $30 additional for an all-channel set even though UHF programs may never be broadcast in his area." 2/

These arguments can be summarized as follows:

1. Consumers will be required to pay more for equipment.

2. Increased costs will reduce sales of equipment and people will be thrown out of work.

3. Consumers will be required to pay for something they may not want or use.

What really happened?

Three years later, the FCC reviewed the effects of the All-Channel Receivers Act on the marketplace.

This is what it found:

1. The price of TV receivers actually went down after implementation of the Act due to competition and production economics.

2. Annual TV set sales increased by over one million -- almost 20% -- between 1963 and 1965, the years immediately preceding and following enactment of the all-channels law.

3. While some consumers may have paid for UHF tuners they never used, the general public benefited because the all-channels law has been credited as a major stimulus to the creation of hundreds of UHF stations that otherwise might never have been available to TV viewers.

FALLACY #10: The Nielsen and Arbitron services are capable of accurately estimating VCR use and thus permitting the generation of additional advertising revenues.

2/ Letter by Donald F. Brinkley, Vice President, Motorola Communications & Electronics, Inc., to Hon. J. Arthur Younger, March 8, 1962.

THE TRUE FACT: The present practices of the Arbitron and Nielsen television audience measurement services fall short of "accurately estimating VCR use" and their future capabilities are unlikely to provide the specific data that advertisers rely upon to select advertising media.

Both services use "meters" and "diaries" to measure television viewing. "Meters" can determine the channel to which a television station was tuned when a VCR recording was made, but cannot identify which recordings are played-back, i.e., viewed.

The Nielsen Television Index -- the only service that measures the audiences of the national networks -- is based on a metered sample of about 1,200 households. By crediting recording as if it were viewing, Nielsen assumes:

1) That every recording is played-back, and

2) That the commercials in advertiser-supported programs are not "skipped" by use of the "fast forward" feature designed into virtually every VCR.

This assumption is proved fallacious by the Mediastat study, which found that 86.8% of VCR owners "skip commercials or erase them." Mediastat confirms this practice by entries from VCR owners which show the "play-back" in 45 minutes of 60-minute commercial television programs.

The actual situation with respect to the Nielsen Station Index and Arbitron measurements of local television viewing of the 1,020 television stations in 215-225 individual markets indicates that even partial data from meters are not available to most broadcasters or advertisers. Except in five major markets where meters are installed in some homes, both Nielsen and Arbitron depend upon one-week "diaries" to measure local station audiences.

These diaries are not designed for the entry of data concerning the recording or play-back of videocassettes. VCR owners are not given any special instructions with respect to reporting such activity. Any entries which are made are "voluntary," as attested to by Arbitron and Nielsen:

> "No special instructions are offered in the diary to households with VCRs. All information we receive is voluntary and without special prompting." (Arbitron, March 26, 1982.)
>
> "(T)he diary has not been specifically modified to gather VCR usage. Nor are there detailed instructions as to how to record the activity. Recording and playback information is supplied by the respondent on a voluntary basis." (Nielsen, March 23, 1982).

At the present relatively low level of VCR penetration, i.e., less than five percent of U.S. television households are equipped with this equipment. These deficiencies have not yet alarmed advertisers. But there is little doubt that advertiser confidence in television audience ratings will clearly decline with expanded VCR usage. It's also certain that advertisers will pay less for network or national spot commercial time when their messages are subject to wholesale deletion by the flick of a "pause" or "fast forward" button, if indeed automatic electronic commercial killers do not become an integral part of VCR equipment.

FALLACY #11: The marketplace can take care of any maladjustments because movie producers can demand more from their product from other markets.

THE TRUE FACT: The opponents of the Mathias amendment persist in this claim which is notable mainly in demonstrating a naive lack of knowledge about the movie and television marketplace.

Theater owners will pay no more in licensing fees than they think they can retrieve from their box offices. Pay cable program services, such as Home Box Office, negotiate license fees based on per subscriber charges set by the cable systems. Network television negotiates its license fees on a standard of how large is the anticipated TV audience, and how much they can charge advertisers. None of these market arenas will take kindly to the suggestion from Sony and its lobbyists that theaters, pay cable, and networks must increase their licensing fees and risk losing viewers in order to recoup revenues siphoned off by VCR usage.

This is something to be received bleakly by network television. Why on earth should network television pay more for a film that will be taped millions of times when it is exhibited, when the networks can only survive one run instead of several runs for which they now bargain, particularly when the commercial messages are either "fast-forwarded," zapped by automatic "killers" or "paused" and not recorded?

There is something peculiar in assertions by opponents that in order to relieve manufacturers of video machines and blank tapes from having to compensate copyright owners, all other markets must take up the fiscal slack. In a free society, neither parliaments nor presidents can force a businessman to pay more than he can expect to receive for something he offers for sale.

CONCLUSION: THE RIGHT OF CREATIVE PROPERTY OWNERS TO BE PROTECTED AGAINST UNLICENSED USE OF THEIR PROPERTY.

No matter the lengthy arguments made, no matter the charges and the counter-charges, no matter the tumult and the shouting, reasonable men and women will keep returning to the fundamental issue, the central theme which animates this entire debate:

> Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation.

That is the issue. That is the question. And that is the rostrum on which this entire hearing and the debates to follow must rest.

The U.S. film and television industry is not looking for any "sweetheart deals." We are asking for no favoritism nor do we tug at your lapel to grant us some special privilege. All we want is the same fair treatment that other property owners in the land find fixed in their daily transactions.

The U.S. film and television industry is a precious trade asset. Congress has a responsibility to nourish that worth and not allow it to be crippled.

We are supporting a congressional measure which is an intelligent compromise, a sensible alternative to summarily reversing a court of appeals decision, and thereby risking abuse of the Constitution for disallowing what the Fifth Amendment makes so plain.

You are grappling with an important watershed decision.

What you do now will begin to set in place a Congressional charting that other Congresses can follow with confidence. You will be readjusting the law so that it is both comfortable and fair with new technology which threatens the very medium which allows that technology to return handsome profits to its inventors.

Most importantly, the public interest is at stake. It is that public interest you have sworn to serve and it is that public interest which cries out for clear markings of ownership and incentive, without which the future landscape of television entertainment will be more barren than we dare imagine. Technology must not be allowed to leap beyond the boundaries of the Constitution and fair treatment for property owners.

Is it in the public interest that a new technology suddenly thwart the creative community of this country in its efforts to bring enjoyable entertainment to American homes?

The answer, of course, must be NO.

How to give that answer?

You sound your answer firmly, clearly, when you recommend to the full Senate the passage of Amendment No. 1333 to S. 1758. By that action, you set right what is now plainly wrong.

STATEMENT OF DONN B. TATUM

CHAIRMAN, EXECUTIVE COMMITTEE, WALT DISNEY PRODUCTIONS

Walt Disney Productions is a corporation engaged in, among other things, the production and distribution of motion pictures, most of which end up on the television screens in this country. These motion pictures are currently being produced in California, although by the end of the year there will be substantial ongoing production in Florida and Connecticut.

I have been with Disney for 26 years, 25 as an officer of that Company, including being its President, Chief Executive Officer and Chairman of its Board of Directors. As a result of that experience and my prior positions in the management of local and network television companies, I am familiar with what it takes in the way of money, creative effort and the combination of skills and talents of many individuals to produce and disseminate these works to our society. Feature motion pictures are consistently the most expensive, most complex type of copyrighted work to create.

I was directly involved in the decision to sue the Sony Corporation for infringements of the copyrights in our motion pictures caused by the Betamax machine. I was also instrumental in deciding, after the Ninth Circuit Court of Appeals unanimously supported our legal position, that Disney should seek the help of Congress in its attempts to resolve the difficult societal issues which the sale and use of video and tape recorders could continue to pose in the future.

I am submitting this statement to show our wholehearted support of the Home Recording Amendment 1333 to S. 1758, introduced by Senators Mathias, Baker, Stevens, Byrd and Cranston, and co-sponsored by 11 others, which would resolve the issues surrounding the future sale and use of videotape recorders.

That great American writer, Samuel Clemens, who is better known under his pen name Mark Twain, once commented:

> Only one thing is impossible for God --
> to find any sense in any copyright
> law on the planet.

This obvious exaggeration was reflected to some degree by certain members of this body after the appellate decision came down in the Betamax case. Indeed, legislation to overrule the court was introduced the very day after the decision was announced, but undoubtedly even before the court's opinion has been read, let alone its rationale digested and discussed.

My purpose here today is not to go over the legal details of that decision by the Court of Appeals. I do wish, however, to address what I consider to be an important point that to a large degree has been lost in the shuffle of emotional reaction to the home taping issue. The appellate Betamax Opinion did touch on this point, but I would like to emphasize it today.

When Mark Twain commented that there was no sense found in copyright law, he was disturbed that he, as a writer, and others like him in this country were not being given sufficient incentives to create new works and to get firms to publish those works. It was a generally acknowledged fact that the literature in America during the 19th Century was pitifully inadequate both in quality and quantity, because of insufficient copyright protection for works. In testimony before Congress, when it was considering enactment of a Federal copyright law at the turn of this century, he vigorously supported the enactment of legislation that would provide authors with enough economic incentives to develop an atmosphere conducive to the creation of new works.

That was precisely the reason why the Founding Fathers of this country thought it important enough to place in our Constitution a specific power for Congress to enact federal copyright statutes. (U.S. Const. Art. 1, Sec. 8, Cl. 8). James Madison, in "The Federalist Papers" (No. 43), commented on this provision in the then proposed Constitution:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.

Madison was careful to note that copyright laws were for the "public good." The Founding Fathers were more than aware that the long term public good was enhanced by granting copyright incentives for two purposes: First, to create new and vital works of authorship, which in turn would provide our society with needed cultural development and enjoyment of those works by its citizens; and secondly, and perhaps even more importantly, to provide firms with the incentives to publish the new works to as wide a group as possible. A poem, novel or movie sitting on a shelf all its life does not generate much "public good."

Perhaps a good contrast to our copyright system is the Soviet Union. It has one of the weakest copyright laws in the world and also has produced - not oddly - little new literature of any merit since the Communist Revolution. Some of this is clearly due to the totalitarian nature of their governmental system, but it is curious that Soviet dissidents seek copyright protection for their works outside their own country to assure themselves that publishers can be found to disseminate their works.

I am not suggesting Congress apply a theory espoused in the late 18th Century by the writers of our Constitution that no longer holds true in today's world. I am not an academician, but a businessman who lives in the practical world. Like other persons I have to support my family by earning money. If I cannot earn enough from my current position, I would be forced by that circumstance to either change what I am doing or do something else. The same is true for an author-company like Disney. If we are not making money from one source of activity, we have to find ways of doing so or we go out of business.

In our business there is a direct correlation between quality and cost. If Disney saw that over a period of time it was merely covering its costs or was actually losing money on its motion picture productions, it would either have to lower the quality of its production values or go out of the motion picture business altogether.

The unrestrained and uncompensated usage of our copyrighted motion pictures by videotape machines could cause this to happen, not just at Disney but throughout the industry. The demise of high production standards, plus a lessening of the number of companies producing motion pictures, would certainly not benefit society. This could actually occur, as the residual markets of television, both cable and broadcast, would to a large degree disappear; so would a large part of the prerecorded videocassette business and the non-theatrical business. This would be a shame -- both for the advancement of our country's cultural heritage and for the joy such works are capable of bringing to our citizens.

At Disney we have already experienced this negative pressure on our business caused by the videotape machine. When the machine population grows, the harm to our business will clearly increase. Private motion picture collections procured by off-air taping, amassed in a widespread manner as here logically envisioned, will adversely affect later exhibition of feature films on television, theatrical re-releases, home and other 16mm non-theatrical rentals, and sale or rental of prerecorded videocassettes.

As just one example, we have been asked often to license to pay television a number of our classic motion pictures. We have decided not to license them, although we would like to, because we believe such use would result in the making and use of thousands of copies which would be out of our control. This is an example of an immediate loss of revenue we could have obtained, because of the unbridled usage of videotape recorders.

A former president of Sony Corporation of America admitted in the press (while in Sony's employ) that the producer-copyright owners will lose revenues from use of the VCR. VCR manufacturers claim that the producers' fears of losses are unfounded because the machines are used almost exclusively for "time shift" purposes. The manufacturers' advertising (which promotes libraries of our pictures) belies this position. That plus the phenomenal sales of blank cassettes convinces us that people do build archives of our films. Take for instance when "Gone With the Wind" was first televised after introduction of the home video recorder by Sony in 1976. There was a virtual black market of blank videotapes before the showing of that classic picture. The news media reported that VCRs and blank tapes tapes had been sold out. Those tapes were purchased for archival retention, not mere "time shifting."

The Senate itself recognized the problem confronting us in the report issued in 1976 in connection with the bill which became the present Copyright Act, as follows:

> "Isolated instances of minor infringements, when multiplied many times, become, in the aggregate, a major inroad on copyright that must be prevented." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

The making of a motion picture results from the contribution of many talents and skills. The economic impacts involved here are not limited to a relatively few copyright holders. The remuneration to writers, actors, directors and musicians depends significantly upon revenues earned from uses of a film in markets other than the theaters. The pension and health and welfare funds of the numerous craft guilds and unions are directly benefited by revenues from these so-called supplementary markets. Thus many people lose by the uncompensated use of the work to which their skills contributed and by the diminution of those supplementary markets.

The cost of a motion picture and the risks taken are high, as Mr. Valenti has pointed out to you. It is not a question of feeling "entitled" to a profit; it is a question of whether-- as our Founding Fathers and other authors, including Mark Twain, put forth -- Congress will act so as to continue our right to compensation for use of our copyrights.

What we are asking for is that under a compulsory license program owners should be paid by the VCR and blank tape manufacturers to compensate the copyright owners for the use of their works. We are asking Congress to take the long view, one that will benefit society in accordance with the time-tested foundation of copyright incentives.

I thank the Committee for considering my views and those of Walt Disney Productions.

STATEMENT OF JUD TAYLOR

PRESIDENT, DIRECTORS GUILD OF AMERICA, INC.

I appreciate the opportunity this Committee is providing the motion picture and television film community to express its views on a critical issue which has substantial creative and financial ramifications for us.

I am President of the Directors Guild of America. Our Guild has 6,270 members. The men and women who work in the field of directing theatrical films and television programs are instrumental in the shaping and artistic evolution of each product which is seen in a motion picture theater or on a home television screen. Directors are to the film industry what a conductor is to an orchestra. We are responsible for the harmonization of actors, scenery and ideas into a product which will appeal to the viewer. This has never been an easy task. But the complexity of our work and the demands for creative excellence in the field of direction increase as the public's demand for varied and innovative programs increases each year.

The Directors Guild is a large and diverse group of men and women having different talents, creative abilities and skills. As we work on films which emerge from studios or on locations in this city or elsewhere, our responsibilities vary according to our backgrounds, talent and seniority. Films require more than merely a director. In addition, there are First Assistants and Second Assistant Directors as well as Unit Production Managers. Video tape shows require Associate Directors, Stage Managers and Technical Directors. Each has a different role in the creation of a film ranging from overall artistic supervision of the actors and actresses in the case of background actors, cueing of cameras and talent etc. Because of the diversity, the salary scales of our guild members vary widely. From those we consider to be in the work force, the current unemployment rate is 40% in all categories. Despite different economic circumstances based on experience and talent, all of the members of the Directors Guild must depend on the overall economic vitality of the motion picture and television film industries for our economic security. When this industry is suffering financially our ability to help create movies and TV shows is seriously limited and our livelihoods are in jeopardy.

Despite our skills and hard work, the products which we help create are by no means guaranteed to attract widespread public acceptance. In fact, very few of us are fortunate enough to direct many box office hits or top-rated television films. The tremendous financial risks of motion picture and film production are such that our Guild members could never survive in the industry if success at the box office or in the ratings alone determined whether a program could recoup its investment.

Most of the programs we help create must be shown in multiple markets in order to be profitable. If our films are not viable in secondary markets, our industry would be seriously harmed and our ability to work in the direction and creation of films would be severely limited.

Our Guild is most concerned that widespread use of videocassette recorders will seriously harm the American film and television industry and erode its financial viability because of the impact of this new technology on after-theater markets. Others will present testimony on this subject who are better informed than I to discuss the precise economic impact of the VCR on our industry. However, one does not have to be a renowed economist or statistician to understand that when millions of copies of one of our programs are made for free use on home VCRs, the incentive to pay to view our creation again has totally disappeared. This fact cannot be disputed.

We believe that the legislation introduced by Senator Charles McC. Mathias and cosponsored by 15 of his colleagues (including Senators Howard Baker, Robert Byrd, Ted Stevens, and Alan Cranston) offers the best legislation to permit the public to view and tape our films and at the same time to establish a mechanism to compensate the film industry production companies including all of the members of the Directors Guild.

As President of the Directors Guild, I want to emphasize that our organisation is only one segment of the creative and organizational structure which creates entertainment programs enjoyed by Americans and millions of others in foreign nations. Our members generally are not seen on the screen. Few of us are household names. Yet, we all take great pride in our work and we all depend on the vitality of the motion picture industry for our livelihood and our future.

I ask that the members of this Committee consider this as you deliberate on the fate of this legislation and weigh the equities involved with this momentous issue. American consumers want access to quality entertainment programs. Directors Guild members want to work in an industry which will continue to provide innovative, quality films and employment for its members. I see no conflict between consumer needs and our industry's goals. However, I do believe that the Congress must protect intellectual property and provide sound leadership in charting a course that will permit our members to have the economic security they must have to meet the public's expectations.

TRAINING MEDIA DISTRIBUTORS ASSOCIATION
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BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE

HOUSE JUDICIARY COMMITTEE

STATEMENT OF JACK L. COPELAND

CHAIRMAN, COPYRIGHT COMMITTEE

TRAINING MEDIA DISTRIBUTORS ASSOCIATION

LOS ANGELES, CALIFORNIA

April 12, 1982

My name is Jack Copeland and I am the Chairman of the Copyright Committee of the Training Media Distributors Association (TMDA). TMDA represents 25 organizations - mostly small business - importantly involved in the producing and distributing of several thousand standardized audio-visual training programs - primarily motion pictures - for use by business, industry, government, and education throughout the world.

Every major organization in the United States depends to some degree on TMDA members' programs. We are today playing an essential role in achieving the productivity goals which are so important to American industry, government, and individuals.

Today our programs are helping organizations like General Motors, Chrysler, U.S. Steel, and literally, thousands of others upgrade management and the skills of their workers. We are training millions of workers in Government Agencies, the Armed Forces, hospitals, stores, offices, and factories throughout our land in everything from computer operations, management training, and foodservice to sales, motivation, and health care. Our members have literally thousands of programs on virtually every important area of human endeavor. And, we have invested tens of millions of dollars in the future of the training media industry.

In the past our members sold or rented copies of their programs in the so-called "non-theatrical market" to customers who exhibit them by direct projection in their own organizations. But, we see a different scenario in the future - one which involves the additional, secondary activity of televising important educational and training programs into American homes where people - both adolescent and adult - will receive individualized instruction on important subjects relating to their work and health under highly efficient and economical circumstances.

We believe that the growth of cable systems and low-power television broadcasting stations will offer us an unparalleled opportunity to reach select audiences with highly-specialized interests. We foresee a time when training and education - which today takes place on the job or in the school - will take place in the home. We foresee a time when we can bring valuable instructional knowledge to shutins, the housewife and mother attempting to develop skills for the world of work, students, senior citizens, and workers with little time to go to school after a hard day at the office, all of whom want a better, more rewarding life, all of which they can be helped to attain through the use of our members' programs.

A growing number of our members' programs are already being used as informational programming for television and we see this activity as essential for our industry's future economic health. We are therefore vitally concerned with the issue of off-the-air video taping in the home, its proper control, and proper compensation for copyright owners.

Our members generally agree that the permanent availability of their programs in the home once taped will adversely affect the market for the sale and rental of copies both to organizations and to the home video market. Home video taping will also diminish potentiality for future television reruns. All of this must be considered along with our experience which indicates that the receipts from televising our programs will fall far short of our production costs. We must, therefore, continue to look to other sources of revenue such as the non-theatrical market and royalty income.

We recognize that home video recording is a technological reality we must accept and work with creatively and positively. We only ask that legislation legalizing this activity do two things: first, institute a reasonable method to compensate copyright owners and, second, be strictly limited to private use of the copies.

It is our position that any law which would authorize the free, uncontrolled off-the-air taping of our members' programs in a school, factory, office or home environment would be tantamount to the legalization of theft and the destruction of our small but vital industry. It is not inconceivable that dozens of offices in an organization could easily be equipped with inexpensive video recorders in such a way that massive copying of any TMDA member's program could take place. Many individual businesses already possess hundreds of videocassette player-recorders.

After careful study, our Board of Directors has concluded that H.R. 5705 - the Edwards Bill - and Amendment 1333 to S 1758 - the Mathias, Baker, Byrd Amendment - meet our criteria for a proper approach to off-the-air video taping in the home. Their scope is confined to home use only, and they provide for a practical, compulsory royalty approach. We shall, of course, continue to be concerned - should these measures become law - that the ultimate royalty formula reflects just compensation for the use of works belonging to our members.

We also support the provisions in these measures which permit copyright owners to control the rental, lease, or lending of copies of their works. The free market isn't working efficiently or effectively to accomplish this necessary end; restrictions are currently built into cumbersome written agreements which interfere with the smooth transaction of daily business. H.R. 5705 recognizes that rental, lease, and lending are rights which must be reserved to copyright owners to prevent undue exploitation.

There are many horror stories concerning the unauthorized subdistribution of our programs. Here's an example: A TMDA member company produces a very valuable training program. The audience for it is highly limited. There might be a thousand potential customers for it in the entire country. Copies are sold to an organization - ostensibly for the purpose of internal training. Later the organization decides to rent or loan out the program for either direct or indirect gain. By advertising, the organization soon reaches a significant percentage of the producer's potential market. It has taken no risk, spent no development money, and may already have derived full value from the program by utilizing it for internal training. Unbelievable - not at all. Most training media distributors live with the constant threat of this possibility and have had to contend with it on numerous occasions.

The members of the Training Media Distributors Association wish to emphasize that an important group of producers/distributors - those who make training media - are not "big" business and are not involved in the "entertainment" business. They utilize the techniques of Hollywood, to be sure, but the results of their work are to serve the more serious needs of our society. Weakening laws by making "straw men" out of the entertainment industry can only result in severely damaging the specialized copyright owners who are members of the Training Media Distributors Association.

We respectfully submit that H.R. 5707 and Amendment 1333 to S 1758 strike a proper balance between the needs of copyright owners - including TMDA members - and a public armed with tremendous technological power within the home. We encourage the support of these measures and look forward to answering your questions.

Thank you.

- - - - - - -

STATEMENT OF RICHARD H. OREAR

PRESIDENT, NATIONAL ASSOCIATION OF THEATRE OWNERS

My name is Richard Orear, and I am President of the National Association of Theatre Owners. Our Association represents the owners and operators of motion picture theatres in every state of this nation. Many of these theatres are owned by small businessmen. There are over 18,000 motion picture screens in the United States. The 1981 attendance at these theatres reached over 1 billion movie-goers.

The motion picture theatre industry had box office receipts for the year 1981 of almost $3 billion. The exhibition industry employed over 130,000 workers.

It is a great pleasure for me to be here this afternoon because I believe that the passage of the Home Recording Act of 1982, Amendment 1333 to S. 1758, is very important for the continued viability of the motion picture industry, on which our members depend.

Motion picture theatres have survived in this age of rapid technology by offering to the American public an entertainment experience that is unique -- the ability to view great creative works in settings of comfort and conviviality has become a way of life ever since Edison first made a flickering image on the screen.

Americans have always had many alternatives from which to choose their entertainment. These alternatives are now even more varied and growing, as engineers and technicians produce new equipment for home use. The expanded use of pay cable and pay-TV, especially when coupled with the relatively new video tape recorders, will make it easier for the public to view full length motion pictures in their homes. It is obvious that the new home delivery systems will become even keener competitors. We cannot say to what extent these competitors will fragment the audience, and thus reduce the income of the theatre. But movie theatres are willing to compete in this entertainment market, providing all those who compete use the same ground rules. To date, the VCR gets its material free. Theatre owners must pay a license fee to the owners of the creative property. It's only fair that the rights of the copyright owners are protected, and that they receive fair compensation for the use of their creative efforts, whether it be in a theatre or on video tape.

The theatre and home viewing options available to the American public to date are dependent upon a unique product -- movies. This product, in turn, is totally dependent upon a healthy and active industry. No one can deny that motion picture theatres offer the opportunity to experience something that is bigger than life -- a big screen, new sound reproduction technologies, improved production techniques -- which are all focused on providing the viewer with a very special experience. But, the ability of our theatres to continue to do this depends upon the motion picture industry's creative ability, and frankly, financial capabilities as well. Investments required to produce the thrilling scenes of "STAR WARS" or the suspense of "RAIDERS OF THE LOST ARK" are immense. The public wants to see the great works of the American movie industry. But to keep this process continually moving, the creators must be rewarded for their labors.

Let me explain a little bit about the business of movie theatres and the movie industry. First, everyone has heard about the pictures that become box office smashes - that rare film which is both a popular and a commercial success. Let me point out that no one knows at the time a film is being conceived, whether it will have the right combination of stars, story and creative genius to become a hit. All of the creative people involved hope that it will, but we in the theatre business are acutely aware that very few films find total acceptance by the public. In fact, investments in films are so risky that a recent film investment prospectus registered with the Securities and Exchange Commission, stated in regard to public taste that it is both "unpredictable and susceptible to change without warning or explanation". And that's an understatement as I am sure you in Congress know.

Motion picture theatres bid on motion pictures as they become available. The successful bidder hopes he has selected a picture which the public in his respective area will like in ever-increasing numbers. Our theatres must be open year round, and our members need new releases and re-releases in order to offer a variety of entertainment to the public.

What the American public wants is to be able to continue to view creative and imaginative works. This continued flow of creative works can only be assured by casting the investment net wide. I believe that it is creativity and imagination that is at issue here, and how we ensure that it continues to be supported.

Video cassette recorders now provide the technical means of taking the works of creative people from them without compensation. If we allow a new technology, the VCR, to take property without paying for it, I believe the nation will be jeopardizing one of its greatest assets -- our film entertainment industry.

I know you will be told that no harm will come to the industry if video cassette recording in the home is exempted from copyright protection, but I cannot see how that assertion can be believed when confronted with the experience of the audio recording industry, and simple common sense. Other works of art are protected from unauthorized reproduction because their value erodes as their numbers multiply. How can a film be any different? And I expect that you will hear the argument, "if it ain't broke, don't fix it" in reference to the film industry today. To that, I would only say that in this case, an ounce of prevention is certainly worth a pound of cure.

The Constitution provides for the copyright, and Congress is responsible for keeping it viable in the face of emerging technology. The members of the National Association of Theatre Owners urge you to take action to protect the American film industry and the creative genius that it fosters. We as a nation will be poorer if you don't.

Thank you.

GENE ALLEN
International Vice President
International Alliance of Theatrical Stage Employes and
Moving Picture Machine Operators of the United States and Canada
7715 Sunset Blvd., Hollywood, CA. 90046

MY NAME IS GENE ALLEN AND I AM VICE PRESIDENT OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA -- KNOWN AFFECTIONATELY, I HOPE, AS THE I. A. I AM ALSO EXECUTIVE DIRECTOR OF LOCAL 876, THE SOCIETY OF MOTION PICTURE AND TELEVISION ART DIRECTORS. IT IS A PLEASURE FOR ME TO BE HERE ON BEHALF OF SOME 63,000 MEMBERS OF THE I. A. TO TESTIFY IN STRONG SUPPORT OF AMENDMENT 1333 TO S. 1758. THE 63,000 MEMBERS ARE, BY THE WAY, SPREAD OUT ACROSS FIFTY STATES OF THIS NATION.

THE I. A. FEELS THIS LEGISLATION PROVIDES A MECHANISM TO ALLOW AMERICANS TO ENJOY THE FRUITS OF MODERN TECHNOLOGY, WHILE PROVIDING THOSE OF US WHOSE JOBS DEPEND ON THE HEALTH OF THE MOTION PICTURE INDUSTRY A FAIR OPPORTUNITY TO BE PAID FOR OUR LABORS.

IN ADDITION TO STAGEHANDS AND PROJECTIONISTS, THE I. A. IS MADE UP OF SOME TWENTY-SIX OR MORE CRAFTS -- FROM PROPERTY CRAFTSMEN, A LOCAL COMPOSED OF CARPENTERS, DRAPERS, GREENSMEN, DECORATORS, AND OTHERS, TO PHOTOGRAPHERS, LAB WORKERS, SOUND AND CINETECHNICIANS, COSTUMERS, MAKE-UP ARTISTS AND HAIR STYLISTS, PRODUCTION OFFICE COORDINATORS, CRAFTS SERVICE, ELECTRICIANS, PAINTERS, FIRST AID, EDITORS, ILLUSTRATORS AND MATTE ARTISTS, SCENIC AND TITLE ARTISTS, PUBLICISTS, CARTOONISTS, SET DESIGNERS AND MODEL MAKERS, STORY ANALYSTS, SCRIPT SUPERVISORS, TEACHERS -- NOW YOU KNOW WHY THE END TITLES OF MOVIES GO ON... AND ON ...

AS YOU KNOW, THESE MEN AND WOMEN REPRESENT A POOL OF TALENT UNEQUALED IN THE WORLD -- AND THEY DEPEND FOR THEIR LIVELIHOOD ON INVESTORS -- INDEPENDENT PRODUCERS AND MAJOR STUDIOS -- WHO ARE WILLING TO TAKE THE CONSIDERABLE RISK THAT THE CONCEPT CREATED BY A WRITER AND MOLDED INTO A SCREENPLAY WILL BE SOMETHING MILLIONS OF THE WORLD'S CITIZENS WILL BE WILLING TO PAY TO SEE.

THE I. A. SUPPORTS THE HOME RECORDING ACT BECAUSE IT IS A MEANS OF MAKING SURE THAT THOSE WHO FUEL THE INDUSTRY BY MAKING

INVESTMENTS CAN BE ASSURED THAT THEIR COPYRIGHTED WORKS ARE USED BY OTHERS ONLY AFTER RECEIVING THEIR PERMISSION.

WE SUPPORT THE ACT BECAUSE OUR MEMBERS ARE OUT OF WORK. THE UNEMPLOYMENT FIGURE RANGES FROM 40 TO 60 PERCENT, AND WHEN OUR MEMBERS ARE OUT OF WORK OUR HEALTH AND WELFARE AND PENSION PLANS SUFFER BECAUSE EMPLOYER AND EMPLOYEE CONTRIBUTIONS ARE BASED ON HOURS WORKED.

CONTRAST THAT WITH THE TDK AUTOMATED TAPE PLANT IN JAPAN THAT HAS NO PRODUCTION WORKERS. PROFITS IN JAPAN BY THE MANUFACTURERS OF VCR's AND BLANK TAPES ARE SOARING. WE DON'T THINK IT MAKES SENSE TO EXPORT PROFITS OVERSEAS AT THE EXPENSE OF JOBS AT HOME. IT'S NOT FAIR. IT'S NOT RIGHT.

I KNOW THIS IS A COMPLEX SUBJECT AND I'N NOT A COPYRIGHT EXPERT. BUT AMENDMENT 1333 TO S. 1758 SEEMS TO ME TO STRIKE THE APPROPRIATE BALANCE BETWEEN PROTECTING THE ECONOMIC INCENTIVE CREATED BY THE COPYRIGHT AND THE DESIRE OF AMERICANS TO USE NEW TECHNOLOGIES. IT IS FAIR LEGISLATION AND WE NEED IT.

SPEAKING FOR INTERNATIONAL PRESIDENT WALTER DIEHL, THE GENERAL EXECUTIVE BOARD, AND OUR 63,000 MEMBERS, I HOPE YOU WILL ACT TO PASS THIS VITAL -- THIS VERY NEEDED LEGISLATION.

THANK YOU.

Senator MATHIAS. Mr. Heston.

Mr. HESTON. Thank you, Senator.

In view of Mr. Valenti's generous introduction, I should for the record enter a disclaimer of any political ambitions. I have already been President of the United States three times. [Laughter.]

Unfortunately, neither could I bring with me that stick I used on the Red Sea; we could end all these problems very simply if that were functioning in this chamber. Instead, I have only to offer what meager judgment I possess. But I am very anxious to testify on this issue. I think it is a vitally important one.

Last year, as you know, a Federal appeals court ruled that use of videocassette recorders, VCR's, constituted copyright infringement. Now, to those of us in movies and television, copyright is a shield that protects our property rights in the films we make. The day after the court handed down that decision, bills were introduced to overturn the decision. Since then, of course, Senator Mathias has authored an amendment to Senator DeConcini's bill, compromise legislation which is supported by the Senate leadership and has ample support from the House, as well.

This legislation, of course, permits owners of videocassette machines to tape off the air without any fear of copyright infringement. It also sets up a system whereby the manufacturers and the distributors of the machines and blank tape cassettes would pay a royalty fee to those who make the films these machines consume to compensate them for their property, just as is now done with jukeboxes and cable television. The American film industry, the hundreds of thousands of people who create movies and television programs, strongly support this legislation for three reasons.

First, it will allow millions of Americans to use and enjoy their VCR machines without fear that they are somehow engaged in an illegal violation.

Second, the American film industry depends for its financial viability on what we call after-theater markets. That is prerecorded cassettes, pay, cable television, network television, and local stations, syndicated television. It is a fact that the vast majority of films, 8 out of 10 in fact, cannot recoup their investment at the box office. So, of necessity, they must be licensed to all these after—theater markets—I repeat, all of these markets, including VCR's. And it is these markets which will be eroded and undermined by the VCR, as Mr. Valenti outlined. After all, if a consumer already has a tape of a movie, he is not likely to turn to one of these other, ancillary marketplaces to look at it.

There is another danger, a very real one, which Mr. Valenti also alluded to. That is the capacity of machines to remove the commercials on which network television depends. They can erase the commercials after the programing has been taped, or the newer machines can erase them during taping—quite a frightening capacity.

Mr. Valenti read the letter from the Frito-Lay people, outlining their plans. It is obvious that no advertiser will pay long for commercials when half his audience is blanking out the message he is paying for—the message, incidentally, on which network television depends.

Right now, there are 3 million VCR's in this country. Before this decade is out, projections indicate there will be as many as 40 million. You can understand the danger we perceive on the horizon; it is a very real one.

The third reason this compromise bill makes sense to me is that it will guarantee a continuing supply, a steady stream of worthwhile entertainment. Movie and television programs do not come from the tooth fairy. The people who make them do it for a living. Unless they can do this profitably, they will not make as many films, and they will not be able to make them as well. If this happens, the public will lose, the country will lose, too. American films represent a very valuable trade asset on the world market. As Mr. Valenti pointed out, they contribute each year nearly $1 billion to the American Treasury in surplus balance of payments.

Incidentally, that resource is created without using any natural resources beyond the creative energies of the men and women who make the films.

Finally, the Japanese manufacturers who are fighting this compromise bill say they will not pay the license fee. They insist they will pass it on to the consumers. Expert economists have looked at this and disagree. They say first the amount of the royalty fee could be passed on by the manufacturers will be negligible, because of the fiercely competitive conditions in the industry. Second, the Japanese countries make 100 percent of all VCR's sold in this country, 80 percent of all blank tapes. At such a profitable undertaking, there is no doubt they can afford this licensing fee without harm.

I am not a lawyer. I am not an economist. I am not a copyright expert. I make movies. I know what it takes to make them. I believe very deeply that the American capacity to make films—a capacity unmatched in the world—will be harmed if we let technology outstrip the law in this issue. The amended legislation you are now considering is fair. If you enact it, you will be serving the honest interests of those who provide entertainment, the far larger constituency of those who consume it, and indeed also, the manufacturers who make videotape recorders.

Thank you.

Senator MATHIAS. Thank you very much, Mr. Heston.

[Prepared statement of Charlton Heston follows:]

PREPARED STATEMENT OF CHARLTON HESTON

I am grateful to this Committee for allowing me to speak to you briefly about an issue which in a very real way threatens the rostrum on which sits the film and television programming industry of the United States.

I come to this hearing as one who has been intimately involved in all phases of the motion picture industry for more than 25 years. I have for seven years served as the President of the Screen Actors Guild. I am aware of the precarious nature of the film business. It is risky, it is full of unpredictable turns, and yet it is, as has been often said, the most wanted export of the United States.

What is essential to the dominance of the U.S. film in the world is the caliber, quality and imagination of the people who work as actors, directors, producers, writers, electricians, set designers, cinematographers, grips, carpenters, editors, art directors, and all the myriad occupations that inhabit this fascinating and valuable enterprise.

But there is one element that all these people recognize to be indispensable to the continued flow of what we like to believe is quality entertainment to American families. That indispensable element is called copyright.

Without it we own nothing, though we may have labored long and invested much. Our copyright is our warrant of ownership. It is our protection against those who would take what we have created and use it without our permission or without fairly compensating us.

So, our copyright is both our shield against intruders and our writ of private property. Its ancestry is in the Constitution itself.

That copyright is now in danger. That is why I have come to Washington today, to plead with you and perhaps to convince you to write into the law a confirmation of creative property as private property. Unless you do that, technology will have outstripped the law and in the doing collapsed both the value and the ownership of what we have created.

It is elementary in our business that one does not retrieve the investment in a film from theatrical exhibition alone. The great majority of films must seek investment recoupment potential in post-theatrical markets, prerecorded cassettes, pay cable, pay television, network television, syndicated television. It is the nature of our business to license these creative works to each of these marketplaces. Without those licensed markets, we would surely go out of business.

This very Committee saw the danger in an unlicensed cable market devouring films and television programming. You acted. You passed a cable copyright fee measure which granted a compulsory license to a new technology and in turn established a schedule of copyright fees to compensate creative property owners.

Today, the technology is different but the danger is the same.

The essentials of both these issues are carbon copies, if you will pardon my flimsy metaphor.

The videocassette recorder and its blank video tape, like a previously unharnessed cable television system, has the power to use, without permission, and without compensation that which belongs to others. What we ask of you is to design for the VCR and its blank tape what you earlier created for the cable television market. We ask you to grant a compulsory license to the VCR so that anyone may tape off his TV set in the privacy of the home, and at the same time set up a mechanism for copyright royalty fees to be paid by manufacturers of VCR's and blank tapes.

I am not here to plead this case on a personal basis. But I am here on behalf of my colleagues, hundreds of thousands of them who make visual entertainment for 80 million American homes.

Why are we concerned? Why is there this collective anxiety? Because we know as surely and certainly as we know anything that if VCR's go unlicensed the very shape and form of this industry will change, for the worse. The post-theatrical marketplace will shrink. It has to.

You cannot introduce 30, 40, 50 million VCR's into the population capable of hundreds of millions of tapings every week without subtracting, in a massive way, from the profit potential in the post-theatrical markets.

Everyone in our business knows with awful clarity that if taping machines are gobbling up films and programs millions of times a week, if the machine includes technical means to erase or fast-forward commercial messages, if the owner of the machine records for a permanent collection, then there will be fewer dollars available for entertainment investment. The reason is as plain as simple arithmetic: if you take in less, then you will not invest more.

I am not an expert in the law, nor am I knowledgeable about legislative language and the, to me, mysterious processes from which emerges a Congressional bill. Others will better inform you and answer your questions in those areas. But I do know something about film making. I do know something about the high risk taking that is part of our daily lives. I do know something about the torment and the exhaustion and the long days and nights that go into the creation of a film, from the time the idea is born, until that moment of truth when your film begins to unfold in a darkened theatre before the ultimate arbiter of its fate, the audience.

I know something about all that.

Therefore, no matter what those who think differently about this issue tell you, I can certify to you that it is hard enough today raising the capital necessary to make films without blighting a film's future by a collision with millions of unlicensed videocassette recorders.

I believe the Mathias Amendment is a reasonable and suitable answer to the dilemma and the anxiety of those who work in the film and TV production industry. Most of all I truly believe the Mathias bill is very much in the best interests of the American public, our audience, your constituency. I don't believe the people who live in your state go out to buy technology or hardware or gadgets or whatever that brings moving pictures into their home. What they are buying is entertainment enjoyment. That is what we in the creative community work so hard to provide. Is it wrong that we should ask those who make the machines which tape without stint, machines made for the express and sole purpose of copying on tape what we own, what we have brought to life with money, labor and various skills -- is it wrong that we should say, "If you tape what we produce, then you must give us a fair price for that which you use." Is that so wrong?

I am now ready to stop.

Though you hear my voice today, it carries in its sound the accents and the hopes of all those who are members of the creative guilds, all those who work as craftsmen and artisans, all those who work in the offices and on the sound stages. But most of all, in a most emphatic way, I am also speaking for the American public who recognize -- more clearly than we may think -- that if they want to have a steady supply of programs from which they can choose to see, then the maxim of a fair day's wage for a fair day's work is most appropriate. The public understands that. And that is why it is in the interest of those who watch entertainment in their living room, and those who make the entertainment the public is watching to pass the Mathias bill. Promptly.

Senator MATHIAS. Mr. Eliasberg.

Mr. ELIASBERG. Thank you, Mr. Chairman.

My name is Jay Eliasberg. Until April 1 of this year, I was the vice president of research for the CBS Broadcast Group, a position I had held for more than 7 years. Prior to that, I held various research jobs with CBS over a period of 20 years. In all, I have been involved with broadcast ratings—that is to say, the measurement of audience behavior—for more than 34 years.

I have been asked by the Motion Picture Association of America to appear before this committee to comment on statements to the effect that the use of VCR's will not negatively affect the reported audiences to television programs.

The opponents of amendment 1333 to Senate bill 1758 have alleged that the producers of those programs will continue to be adequately and properly compensated for the audiences their programs have created. This is not the case. On the contrary, VCR use, coupled with the television audience measurement techniques now being used or which will be available in the foreseeable future, will inevitably result in a decline in reported audiences, and hence, in the amounts paid by broadcasters to program producers for their products.

In simplest terms, the producers of television programs will in the long run be paid for their products in proportion to the number of homes their programs reach, as reported by the Nielsen and Arbitron audience measurement services. The question before us then is simple enough: Will the use of tape machines increase, or will such use decrease, the size of the reported audience to the programs shown on television? The answer is that the use of VCR's will decrease the reported audience sizes of television programs.

Despite the well-advertised conveniece of VCR's, they cannot substantially increase the use of television for actual viewing of television programs. If we make any reasonable allowance for sleep and sleep-related activities and for the hours of the day when no one is at home to watch because of activities such as work, shopping, church-going, vacations, and so on, we are left with something less than 8 hours during which the average family set can possibly be in use.

And since we know that it is already in use for 6 hours and 43 minutes—that was during 1981—it is apparent that VCR use will not increase actual viewing. VCR use will, however, redistribute viewing. Taped playbacks will replace live viewing. Programs which are taped will, on average, be watched more than once. However, because of the limitations of the measuring system, they will be reported as being watched only once. In other words, their audiences will be under-reported. But each playback will replace a live viewing, the audience to which would have been correctly reported.

When under-reported viewing replaces correctly reported viewing, apparent audience size will decrease. As a consequence, the price advertisers will be willing to pay for these apparently smaller audiences will similarly decrease—you have heard some reference to that—and as broadcasters receive less money, so inevitably will program producers get less for their products. As you have already heard, this problem will be exacerbated, as advertisers insist on paying less for playback viewing from which the commercials may well have been deleted or watched without sound, at speeds up to 20 times the speed at which they should be watched.

Another factor must be considered—the time at which the advertiser would like his commercial to be seen. Advertisers now pay for commercials which are seen at a particular time, and they know precisely when it is. But what advertiser of flowers for Mother's Day is going to pay as much to have his commercial seen even a few days after Mother's Day via a playback viewing as he would pay to have it seen before Mother's Day, as his live commercial would have been? What automobile advertiser advertising rebates on his cars wants the commercial seen 3 months after the rebate program has expired, as it might be with a playback viewing?

There is another negative factor at work. In my experience, advertisers on television are more interested in what we technically call "reach" than in "frequency". That is to say, they would rather reach two families once each than to reach one family twice. This is another reason that playback viewing, even if it is properly counted, which it will not be, will be less valuable than the live viewing it will replace. Some of it will be double viewing in the same family, which is not worth as much to advertisers as reaching two families once.

Now again, all of these factors will result in a lowering of the price the advertiser is willing to pay the broadcaster, which must lower the price the broadcaster is willing to pay the program supplier. This committee may be told, as was the House committee considering similar legislation, that there is no problem with the audience measuring system, or you may be told that improvements in the measuring techniques will deal with any problems which may arise. These statements are simply in error. The reasons are too complex to cover in the short time allotted to me this morning. They are, however, covered in more detail in the fuller statement which I have asked be made a part of the committee's record.

In summary, then, VCR use will not increase actual audience size. Moreover, eliminations of the audience measurement techniques available to us would result in the apparent decline of television audiences. No improvement in present measurement techniques can completely solve this problem. This decline in reported audience will be coupled with three other negative factors: First, advertisers' awareness that their commercials will have been deleted from many playback viewings of programs, or that the commercials will be seen under unfavorable circumstances, without sound and at very high speeds; second, advertisers' awareness that their commercials seen in playback viewing will not be seen when they are intended to be seen, and that they will therefore be less effective; third, advertisers' awareness that their advertising will be less effective because part of the apparent audience will be duplicated. All of these factors will reduce the price advertisers are willing to pay for television advertising. This will inevitably reduce the amount program suppliers receive for their products.

Thank you very much.

Senator **Mathias**. Thank you, Mr. Eliasberg.

[Prepared statement of Jay Eliasberg follows:]

STATEMENT OF JAY ELIASBERG

FORMER VICE PRESIDENT, RESEARCH, CBS BROADCAST GROUP

My name is Jay Eliasberg. Until April 1st of this year, I was the Vice-President for Research of the CBS Broadcast Group - a position I held for more than seven years. Prior to that, I held various research jobs with CBS over a period of 20 years. I have been involved with broadcast ratings, that is the measurement of audience behavior, for more than 34 years.

I have been asked by the Motion Picture Association of America to comment on statements that the use of VCRs will not negatively affect the reported audiences to television programs. The opponents of Amendment No. 1333 to S. 1758 have alleged that the producers of those programs will be adequately and properly compensated for the audiences their programs have created. For reasons I shall discuss, this is not the case. On the contrary, VCR use, coupled with the television audience measurement techniques now being used or available in the foreseeable future, will inevitably result in a decline in the amounts paid by television networks and stations to program suppliers.

In simplest terms, the producers of television programs will in the long run be paid for their product in proportion to the size of the audiences their programs reach, as reported by the Nielsen and Arbitron audience measurement services. This is clearly true in the case of advertiser-supported television where the demand for television audiences at any particular time establishes a going "cost-per-thousand homes" that an advertiser is willing to pay to a network or to a local station. This, in its turn, establishes the amount the network or station is willing and able to pay producers or syndicators for their programs.

The question before us then is simple enough. Will the use of tape machines increase, or will such use decrease, the size of the reported audience to the programs shown on television? The opponents of Amendment No. 1333 have suggested that the use of VCRs will have no negative effect on the reported audience size of programs shown on television. Indeed, it has been claimed, and I quote the Home Recording Rights Coalition, that "The VCR is the best friend Hollywood ever had." (Emphasis not supplied.)

I disagree strongly. The extensive use of VCRs will have major negative effects on the reported size of those audiences and on what I shall refer to as the "effective size" of those audiences, i.e., the size of the audience that advertisers are willing to pay for.

Careful examination of the claims of those who feel that use of VCRs will increase the size of audiences to television programs shows that these claims all rely on the (usually unmentioned) assumption that the availability of VCRs will increase the overall use of television. While this may be true to a negligible degree, a simple examination of television use in the average home indicates that neither VCRs nor anything else in the foreseeable future will have any substantial positive effect of the use of television by the average television family.

We think of the day as having 24 hours, and indeed it has. However, from the point of view of television set usage, the effective number of hours in a day is much less. Some time, after all, must be allowed for activities such as sleep, work, etc. Taking these factors into account, the actual time available for television viewing is almost certainly less than eight hours a day, on average. In fact, according to A. C. Nielsen

Company figures for 1981, the television set in the average television household is already in use for six hours and 43 minutes per day. Giving all possible credit to the convenience afforded by VCRs, it is clear that the use of such recorders cannot increase television viewing to any appreciable degree.

If we are faced with an essentially fixed amount of television use, the only effect that VCRs (or anything else) can possibly have is to redistribute that viewing. And so it will. The problem is that in redistributing the viewing it will also reduce the reported amount of viewing and it will reduce the "effective audience". I say this because of the measurement tools which are used to measure audience size.

On the network level, audience sizes are measured through the use of meters. These devices accurately report when VCRs are being used to record and with respect to broadcast programs, what is being recorded. They do not, however, indicate when VCRs are being used to play back programs and to identify the programs being played back. In other words:

> Attended recording, i.e., simultaneous viewing and recording of the same program, is correctly reported because Nielsen reports the home as viewing at the time the recording is done. Subsequent playbacks, however, are not reported as viewing. At best, then, a program recorded with someone in attendance is correctly treated. As soon as the program is played back, however, its audience becomes understated; the network is given no credit for this viewing.
>
> Unattended recording is also reported as viewing at the time of recording. This is, in effect, an overstatement. At the first playback, however,

this overstatement is corrected since the playback is not reported as viewing. Subsequent playbacks are also not reported as viewing, leading to another understatement. There is also some proportion of programs which were recorded but unviewed when the recording was made and never played back; this results in an overstatement. This overstatement is more than made up for by programs which are played back more than once -- whose audiences are understated.

Thus, while audience measurement meters are marvelous mechanisms, they do not and can not accurately reflect VCR recording and playback activity without, on balance, understating the size of the audience on which broadcast advertising rates are based. With increased numbers of VCR-equipped households, the inaccuracies of the metered rating system, particularly where coupled with statistical proof of commercial deletion, must inevitably result in a serious erosion of advertiser confidence in network television as an advertiser medium.

Furthermore, because it is clear that playbacks of video recordings will not increase television use, each playback replaces original viewing to another program. It is because of this fact that the apparent audiences to television programs will decline in VCR-equipped households. Programs which would have been viewed and would have had their audiences correctly reported will be replaced by playbacks of recorded programs. And, as has just been explained, the vast majority of those recorded programs will have their audiences understated. Furthermore, the "effective audience" will decline because advertisers will be unwilling to pay for audiences which may well have eliminated the commercial from playbacks by the use of a "pause" mechanism or "skipped" by use of the "fast forward" features which are an integral part of all VCRs sold today.

There are two other negative factors which must also be taken into account. The first of these is the time at which the advertiser's commercial is seen. One of the major advantages of television today is that the advertiser knows precisely when his commercial will be viewed. If he is advertising snow tires, he knows that his commercial will be seen in midwinter. With the use of VCRs, however, some of the viewing to his commercial will be "playback" viewing and will take place at a time perhaps long after the advertiser desires it. What advertiser of Mother's Day bouquets will be willing to pay full price for viewing which takes place even a few days after Mother's Day? What automobile advertiser promoting a cash rebate program will be willing to pay full price for viewing which may take place months after the rebate program has been terminated? Such viewing would be less than valueless to him; it might even cause ill-will and so, have a negative effect.

The second additional negative factor which must be considered is the question of what households are exposed to the commercial. Without VCRs, the advertiser knows that every household counted in the audience to his commercial is a separate and distinct household. To use the technical term, they are "unduplicated". With VCR use, if we assume that playback viewing is counted -- which it will not be -- the total viewing audience would apparently be the same. Some of the audience, however, would be duplicated; the same household would be counted twice. While everyone will concede the advantage of reaching a household a second time as opposed to only once, it has been my experience that advertisers much prefer to reach two homes once each, rather than the same home twice. To use two technical terms, they much prefer "reach" to "frequency". Even if audiences are counted correctly, which they won't be because they will be understated, advertisers will be unwilling to pay as much for "duplicated" audience as they would be for "unduplicated" audience.

This Committee may be told, as was the House Committee considering similar legislation, that there is no problem with the audience measurement system. Or you may be told that improvements in the measurement technique will deal with any problems which may arise. These statements are simply in error. Even assuming that meters can somehow be engineered to report and identify playback viewing, there would still be a major decline in the size of reported audiences. This would happen because Nielsen in effect would have to add the playback viewing of a program to the "live" viewing to produce the correct total viewing figure for the program. But the viewing figure must be reported within a reasonable time after the original program appears. Actually this means that the playback would have to be done by the Sunday following the original broadcast.

The third Mediastat study of VCR homes, conducted during September-October 1981 shows that less than half of the recordings made would meet the Nielsen requirement of being played back by the Sunday following the day they are recorded. In series programs, this could be partially corrected by attaching the playback viewing to the episode of that series that was appearing in the week of the playback. However, this is not always possible, even for series programs, and it is completely impossible for one-time-only programs. And remember that, as I said earlier, there is no prospect of identifying -- or even measuring the volume of -- VCR playbacks.

If the situation is bad on the network level, it is even worse on the local level. Local measurements, except in a few cities where meters are used, are made with diaries. People are asked to keep detailed records of their television viewing. In spite of the impression which the opponents of Amendment No. 1333 would like you to have, neither the Nielsen nor the Arbitron diaries now in use have been designed in any way to encourage the entry of recordings made for time-shift or any other purposes.

There are no special instructions given VCR owners. Any entries made by VCR owners regarding recording or playback are strictly "voluntary" and cannot be relied upon. Neither the Arbitron nor the Nielsen diaries are designed for VCR owners to note their recording or viewing (playback) activities. In other words, no rating service based on diaries now provides any measurements of the viewing of recordings in their audience ratings data.

The optimism of the opponents of the bill before you will probably lead them to suggest that Nielsen and Arbitron should change their instructions to diary-keeping families and request them to report VCR recording or playback of both. Their optimism would play them false. In my judgment and the judgment of most knowledgeable people in the industry, what is now required of diary keepers already strains their abilities. A set of additional requirements would, I am afraid, push many of them past the point of willingness to cooperate.

In summary, then, VCR use will not increase actual audience size. Moreover, the limitations of the audience measurement techniques available to us -- or ever likely to be available to us --would result in the apparent decline of television audiences. No improvement in present measurement techniques can completely solve this problem. This decline in reported audience will not be coupled with three other negative factors:

1. Advertisers' awareness that their commercials may have been deleted from many playback viewings of programs or that the commercials will be seen under unfavorable circumstances -- without sound and at very high speed.
2. Advertisers' awareness that their commercials seen in playback viewing will not be seen when they were intended to be seen and that the commercials will therefore be less effective or even completely ineffective.
3. Advertisers' awareness that their advertising will be less effective because part of the apparent audience will be "duplicated", i.e., the same family reached more than once through playback, instead of being completely "unduplicated" as it would be without VCRs.

All of these factors will reduce the price advertisers are willing to pay for television advertising. This will _inevitably_ reduce the amount program suppliers receive for their products.

Senator **Mathias**. Mr. Leonard?

Mr. **Leonard**. Mr. Chairman and members of the committee, my name is James Leonard. I am vice president of Robert Nathan Associates, a firm of consulting economists here in Washington, D.C.

My firm was retained by the Motion Picture Association of America to assess the probable impacts on consumers of copyright royalty fees levied on manufacturers of home video recording equipment and blank tape. My statement today is a summary of our conclusions. A report containing all of our conclusions, along with copies of this statement, was submitted to your committee yesterday.

Our major conclusion, drawn from an evaluation and analysis of the structure and competitive outlook for the video cassette recorder and blank video tape markets, is that the greater portion of royalty fees would be absorbed by manufacturers and distributors. Only a relatively small portion of the fees would be passed on to consumers.

This conclusion is based on characteristics of the VCR and blank video tape markets. First, the markets are vigorously competitive. Second, current profit margins provide manufacturers and distributors with the capacity to absorb royalty fees. And finally, there is increasing consumer sensitivity to recorder and tape prices.

Many manufacturers of VCR equipment and blank tapes, as well as a large number of retail outlets, are competing vigorously for the dollars spent by consumers on video equipment, as well as other forms of entertainment. Rapidly falling prices, the introduction of an increasingly wide selection of equipment features, the entry of new manufacturers, wholesalers, and retailers into the markets, and the broad range of brands and models from which consumers are able to choose, all provide evidence that the VCR industry is highly competitive and is becoming increasingly more so.

Additionally, other industries that provide entertainment services and products are actively competing for the consumer's entertainment dollar. The introduction of the video disk player, a close substitute for the video cassette recorder, particularly when it is used to play back recorded movies, has exerted downward pressure on prices of recorder equipment. All combined, these competitive pressures, both within the VCR and tape industries and from outside sources, are compelling manufacturers and distributors to lower VCR and tape prices and to absorb increased costs.

Wide price spreads at the retail level, as evidenced by the large divergence of advertised prices for a single VCR equipment model, demonstrate substantial margins of profit in the distribution chain. Further, the entry of new manufacturers and distributors suggests that the VCR and tape industries offer attractive rates of return on investment. Finally, examination of rates of return for manufacturing companies and the implied returns from their VCR manufacturing activities, indicates that these companies do indeed have the capacity to absorb significant portions of a copyright royalty.

However, consumer price sensitivity is probably the most important characteristic of the recorder and tape markets. At the present time, the average purchaser of a video recorder has a family income in excess of $35,000 a year. But our studies indicate that even this high income consumer is price conscious. Our analysis shows that while current buyers of recorder equipment and tapes have considerable sensitivity to changes in price, potential buyers, consumers with lower incomes who are waiting for the price to come down further, are even more price sensitive. The VCR industry, if it wishes to expand its markets, revenues, and profits, will have little choice but to continue a pattern of reducing prices, even if it must absorb copyright royalty fees that provide compensation to owners of creative property.

Our examination and projections of consumer price sensitivity indicate that, given certain reasonable assumptions about prices, sales, consumer price sensitivity, and the size of royalty fees, the VCR industry would be absorbing $40 of a $50 fee on VCR equipment and 80 cents of a $1 fee on video tapes by 1984. If the VCR and blank tape markets develop in the same manner as color TV, which we think is a parallel development to this particular technological innovation, the industries would be absorbing $45 for the equipment fee and 88 cents of the $1 tape fee by 1990. This would mean that consumer prices would increase by less than 2 percent in 1984 and by only 1 percent in 1990, as a result of the royalty fee.

In summary, we believe that market conditions will not permit any substantial amount of royalty fees to be passed on to consumers.

That concludes my statement, gentlemen.

Senator Mathias. Thank you very much, Mr. Leonard.

Let me say to members of the committee, as well as witnesses, that we have a number of other witnesses to be heard this morning, so in questions and responses, if we can be just as concise as possible, I think it would promote the work of the committee.

Senator Dole?

Senator Dole. I have listened with interest to the testimony, and I think there is a problem. I am not certain I have been persuaded who has the greatest problem, the present panel or the consumers.

Is there anything in the Mathias amendment that would limit the fee that might be imposed on cassettes or on a machine?

Mr. Valenti. Not at this time, Senator Dole.

Senator Dole. I hear $50 and $1 being tossed around. Is that purely——

Mr. Valenti. Senator Dole, many times I have been asked, "What are you talking about as a royalty fee?" and I have thrown those figures out as a hypothetical fee in order to deal with numbers and arithmetic in devising some kind of answer for people who want to appreciate this situation. I think the amounts are reasonable; They could be a little bit lower; they could be a little bit higher. But what we are talking about, Senator Dole, is a one-time fee. Let me assume for the moment that the entire $50, if that were the case, were passed on. We are talking about a machine that has a 10- to 15-year life, so what it comes down to is $3 to $5 per year for the copyright fee. Also we are talking about a tape that has a life of 250 to 300 uses. We are talking about a copyright fee of one-sixteenth of 1 cent each time a person tapes a copyright program. So we are dealing with miniscule numbers that have no material bearing on the economic effect on the people who purchase these machines.

But to answer your question, again, no, there is no ceiling in the bill.

Senator **Dole**. I have tried to read ahead, and some of the other statements keep referring to this as a tax. If it is a tax, then it ought to be in the Finance Committee. I want to just stake that claim. That is why I came down. If there is any money around, we would like to have part of it. [Laughter.]

We have a big problem, you know, with the budget. I am not sure we could balance it with a tax on cassettes, but maybe we should tax cassettes rather than to have a royalty; maybe we could just put it in the Treasury. It probably would not yield that much.

Senator **Mathias**. If the Senator would yield, I think it is the people who use the phrase, tax, who would like to have it go to your committee.

Senator **Dole**. Well, we have several other things——

Mr. **Heston**. We would just like to hold it for a while, first, Senator.

Senator **Dole**. We have a few other things ahead of it.

Mr. **Valenti**. Eventually, everything gets to your committee.

Senator **Dole**. Well, we will get more revenue, I assume, if this passes, but I am not certain from whom we will get it. But the point I would make, as I try to read the Mathias amendment, there is no specificity on how this is going to work and what machines it might cover 5, 10 years from now. I assume technology is changing so rapidly, that is why you are concerned and obviously, should be concerned. Apparently, we have a trade problem here, too, because we have Japan involved—that also comes to our committee. If you start imposing a fee, then there might be some legitimate concerns raised about a restraint on trade. Have you tried to negotiate this problem with the Japanese?

Mr. **Valenti**. My door swings open on easy hinges, Senator.

Senator **Dole**. Wouldn't that be a better solution?

Mr. **Valenti**. I have said, and do repeat here today that I think it is quite possible that if the six VCR manufacturers sat down with copyright owners, that a reasonable fee and a reasonable solution to this issue could be reached quickly, because I think time is of the essence, Senator Dole. That is the key—defining now the rights of copyright owners in the law before this new technology will drown us.

So the answer to your question is: "Yes; it could be done."

Senator **Dole**. I do not want to take further time, but I want to be helpful, if I can, and that may be something to explore. But I am concerned, too, with the government getting out of a lot of things. It looks like the government may be getting into this matter. Have you ever thought about—well, I guess it would not work—but just putting a little notice in the cassette, "If you use this more than once, please send in a dollar"? [Laughter.]

Senator **Dole**. You know, we have a voluntary tax system in America. I am certain everybody who did that would certainly send it to you or to your designee.

Mr. **Valenti**. Perhaps we could do that after the IRS captures the $80 billion in lost taxes.

Senator **Dole**. It is $90 billion. But that is another area that I think needs to be addressed.

Then, I guess, finally, if there is not some other way to make certain that the artist is compensated—I do not have any quarrel with that, but I assume when they are sponsors that they do pay for—I mean, commercials obviously support the program. Now, whether you can build in enough to take care of the problems raised as we find more and more people—it is, I think Mr. Heston said, 3 million now, going up to 30, 40 million.

Mr. HESTON. That is correct, Senator.

Senator DOLE. And I guess there is that problem with that fast button, but again, you have got to be home to do that, and most people—I record programs because I am not there. Maybe you have got an automatic——

Mr. VALENTI. Senator Dole, excuse me. I just wanted to point out, I was talking about on playback, not on recording. There is a remote control button. When you are playing back something you have recorded, and a commercial comes on, you can zap out a 1-minute commercial in 3 seconds and go on to Mr. Heston and the chariot race in "Ben Hur." You do not ever have to see the commercial.

Senator DOLE. But you have to at least watch it, because otherwise, you do not know when to turn it off.

Mr. VALENTI. No, Senator.

Senator DOLE. If you are on a fast track like we are, you do not want to spend 30 seconds—3 seconds would be enough on a commercial.

Mr. VALENTI. That is what I am saying, Mr. Chairman. When the commercial comes on, you speed up the machine. It fast-forwards through the commercial, and you go on to the rest of your show, so that you can see a 2-hour television show in 1 hour and 45 minutes.

Senator DOLE. I do not see all the commercials now. There are other things you can do during commercials. [Laughter.]

Mr. VALENTI. I think that is true, Mr. Chairman, but I do not think anyone goes to the bathroom 14 times—if you do, you have got a medical problem.

Senator DOLE. Some of us have medical problems. [Laughter.]

Well, I appreciate very much the panel's testimony. We want to be helpful, and if we can help you in our committee, we will do that.

Senator MATHIAS. Thank you.

Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you. I think Senator Dole raises a question that was on my mind as to the Mathias substitute or Mathias amendment. Mr. Valenti seems to me to give a pretty much open-door policy for the industry, or the Tribunal, at least, to raise the fee or charge or patent royalty—I call it a tax, but patent royalty—at any time they feel that it is justifiable. What objections does the industry have to setting that and letting Congress decide if, in the public interest, it is important now to increase it from $1 per tape to $10 per tape, or from $50 per video cassette to $500 per video cassette. Wouldn't that be a better way to go?

Mr. VALENTI. In the Mathias amendment to your bill, Senator, the CRT is given 1 year of evidenciary hearings in which the Japanese manufacturers, audio industry representatives, video industry representatives, and others can appear before the Tribunal, offer evidence of whatever kind, in a methodical and precise way, and then the CRT, under the aegis of its authority granted by the Congress, makes a decision as to what is the moderate, fair, and reasonable compensation that should be accorded the artist. But that would come after——

Senator **DeConcini**. Is there any veto by the Congress of what they set?

Mr. **Valenti**. No, Senator.

Senator **DeConcini**. So whatever they finally decide, regardless of how fair or long the hearings have been, that is the determination?

Mr. **Valenti**. Not quite, sir. You always have the courts. If there is an egregious blunder on the part of the CRT, you have the judicial system to appeal to, as people do all the time; when they think they have been aggrieved by a government agency, they can go to the courts.

Senator **DeConcini**. What is the procedure for changing it after the initial 1 year?

Mr. **Valenti**. After the first fee is set, the CRT revisits it every 5 years.

Senator **DeConcini**. So every five years, there would be a review and a chance of increasing or decreasing—I am sure the industry could see its way clear to lower——

Mr. **Valenti**. It depends on the marketplace. It depends on the marketplace, Senator, and the infusion of new technology. Again, we are talking about private property, Senator; that is the issue.

Senator **Mathias**. If the Senator would yield just for a brief observation, I do not think it ought to be forgotten that the Congress will retain its oversight authority, and as long as this committee is in existence, we will have a special responsibility for oversight.

Senator **DeConcini**. Well, I would just ask the Senator from Maryland. We just passed regulatory reform. I do not know how the Senator from Maryland voted on the legislative veto provision that we passed on that, but it would seem to me not to be unreasonable to have Congress have the right to veto whatever the increase or decrease might be that would be set by this tribunal or this CRT.

Senator **Mathias**. Well, that is a power inherent in the Constitution.

Senator **DeConcini**. Well, why did we put it in the regulatory reform, then, if it is inherent in the Constitution? Do you suppose it had something to do that we wanted to be certain that we had a chance to vote on it?

Senator **Mathias**. We can always vote on it. There are always ways.

Senator **DeConcini**. Yes. I have heard that line before, "Don't worry, don't worry. I am here to help you. I am from the Federal Government, and Congress will oversight."

I do have a question of Mr. Eliasberg. In testimony before the Senate in November, Mr. Sidney Sheinberg of Universal MCA said that his position in favor of VCR royalties, taxes, would be seriously undercut if the television rating service, the Nielsen and Arbitron, included the VCR audience. We now have clear evidence that these services are, in fact, measuring VCR use, and that they are increasing the number of VCR homes they sample as VCR becomes more popular.

Do you agree with Mr. Sheinberg that with this audience data, the existing broadcast market can take care of arranging for fair compensation that covers VCR users.

Mr. **Eliasberg**. I am sorry, Senator DeConcini. I have no quarrel with Mr. Sheinberg. I have a quarrel with the statement you just made, however, that this is being properly measured. That was part of the substance of my statement. It is not being properly measured; it will never be properly measured.

Senator **DeConcini**. So you dispute that it can or will be properly measured.

Mr. **Eliasberg**. Yes, sir, I do.

Senator **DeConcini**. Your statement indicated your judgment or your analysis that the American public will only watch, I think, 6 hours or a certain number of hours a day; is that correct?

Mr. **Eliasberg**. I said that it is already watching—I am sorry, we have to stay straight here, because there is a confusion between individuals and homes. What I said is that the American public on average during 1981 had its television set on, one or more sets on, for 6 hours and 43 minutes. In my judgment, that figure cannot go substantially higher. There are just too many other things which, unfortunately for those of us in the television business, have to be done. The enemy is sleep is really what it is.

Senator **DeConcini**. Well, I feel very sorry for the enemy, and that is us, the public.

Thank you, Mr. Chairman.

Senator **Mathias**. Senator Specter?

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Valenti, your reference to minuscule numbers is something that I question. When you talk about $50 which might escalate to $100 easily on cost, it is something which really could be significant for consumers. I was very much impressed on the Appropriations Committee last year, when we talked about Pell grants for college students, to find out that on a $100 reduction for a college student on scholarship aid, how many college students fell out of the program. And I am concerned about an increase in what you may view as minuscule, which may deprive a lot of consumers of purchasing the VCRs. And that comes to the central issue, which is the testimony here today, that there will not be a pass-on by the VCR manufacturers to the consumers, and I do not understand how that is a sound contention when there are so many manufacturers today—six, I think you testified—and they are competing as much as they can, making prices as low as they can to get as much market as they can, and they are going to have an additional cost. What is the logic in saying that they can absorb that cost without passing it on to the consumer, when they are, presumably, now selling as cheaply as they can?

Mr. **Valenti**. Well, I would expect Mr. Leonard, our consulting economist, to go into detail on that, but I would give you a cursory view. No. 1, if you shop around for a SL-5600 Sony today in Washington, you will find a price difference of $571. If you shop around for an SL-5600 Sony in New York, you will find a price disparity of $330. That means the same machine, presumably anchored at the same wholesale price, today is being undercut at retail by discount houses. If you walk into the Globe Bookstore across from the EOB, you can buy a novel for $14.95. If you walk across the street to Crown, that very same book is $3 cheaper. Crown is discounting, and that is the motivation of the American marketplace.

I think that it is reasonable to suggest that those price differentials establish that the VCR is already subject to this fierce price competition, and I believe that will continue.

Senator **Specter**. Well, Mr. Valenti, isn't the lesson of that that the disparity of $560 is going to exist; it is just going to be $50 higher on each end, or $100.

Mr. **Valenti**. Well, again, I refer you to the economic study that was done. I can give you my judgment, and you have a judgment no doubt different than mine. The work of Robert Nathan Associates clearly pointed out to us that the experience of color television which is a comparably priced item is a prime example of how the VCR will fare price-wise. And I also suggest, Senator, that in 1962, the debate before Congress over the All-Channel Receivers Act, which required that TV sets be built with both a VHF and UHF tuner, was very similar to the arguments you will hear about this legislation. The electronics industry, the same people who will be appearing before you later today, wrung their hands and said that the addition of a UHF tuner would price TV sets out of the market by adding $30 to the cost of the TV set, and as a result sales would go down. But Congress passed the All Channel-Receivers Act. Three years later, the FCC studied the result of the act and reported that the price of the TV sets did not go up; they went down. Sales of TV sets did not go down; they went up. Now, that is a function of the marketplace, Senator, and it is not unreasonable to expect like results in the VCR market, if a copyright royalty is imposed upon manufacturers and importers.

Senator **Specter**. But if there is $50 more of cost, whatever other factors may influence changes in price, doesn't that $50 in cost have to go to the consumer? I think they would be delighted to see the Japanese suffer the loss, and you would have very short shrift on the committee, I think, if we could be sure of that. But that does not seem logical to me, in terms of a simple addition factor. But I would be interested to know how the experts rationalize that.

Mr. **Leonard**. Senator, in the sale of any commodity, there is a set of demand conditions which have to be observed by the seller, if he wants to maximize his total profits. You can sort of summarize the kind of problem he has by thinking of, say, an orange. It cost him, say, 15 cents to produce oranges per orange, and he sells it for, say, 25 cents, making a dime profit. Say he has the same condition of a 15 cent per orange to produce, but that he can also sell oranges at $10 per orange, making a very substantially larger profit per orange he sells. The fact of the matter is, though, that that producer of oranges is not interested in maximizing the profit per orange sold. He would not want to sell 10 oranges to make $10 apiece on those when he can sell one million oranges and make 15 cents apiece on them.

So, as a result, there is a unique balance that has to be met here by the seller, looking at the market in which he is operating, to maximize his total profit, and that market is a very important factor, the characteristics of it here. If he raises the price, he is going to lose sales, is what I am saying.

Senator SPECTER. Yes, but that is the precise point. He is now competing with others to hold his price as low as possible, and you are going to add a cost of production, a cost of sales, which is present. And if you reduce sales because there is elasticity in the demand, then there are going to be fewer buyers, and the cost is going to go up even more.

Mr. LEONARD. Well, we are saying, of course, that there is capacity within this industry to lower prices even more than they have been lowered; that there are still very large profit margins in this industry——

Senator SPECTER. But to whatever extent that capacity exists, isn't it going to operate irrespective of what happens on this issue, so that whatever price it may be lowered to, if you put a licensing fee in, that is going to be added on top, and somebody has to pay for it, and it is the consumer?

Mr. LEONARD. No, I do not think so. I think it would be paid by the manufacturer, by the distributers, and some by the consumer, but not as much as $50, by any means. I think that probably a 2- or 3-percent increase in price would be a lot.

Senator SPECTER. Let me shift to one more question——

Senator MATHIAS. Did Mr. Heston have an observation to make on that?

Mr. HESTON. I would, with respect, Mr. Chairman, like to respond to a question Senator Specter raised earlier, while Ms. Sills was testifying——

Senator SPECTER. I was about to come to that.

Mr. HESTON. Tangentially, Senator DeConcini touched on it, too, and my comment is also in part intended to return our discussion to what I think is the basic issue here, which is property rights. Senator Specter asked Ms. Sills, and yesterday when we met, we discussed it as well, what would be the rights in this marketplace, this new marketplace, for an older film—the example he used was "Gone With the Wind." As I pointed out to him then, the actual creators of "Gone With the Wind"—Ms. Mitchell, who wrote the novel; David O. Selznick, who produced it; the director; most of the actors—are dead. Current contracts negotiated by the Screen Actors' Guild and the various creative guilds in the industry, while they have on an ongoing basis constantly negotiated payments to compensate artists who make films for emerging marketplaces, obviously, the older films are largely uncompensated in that area. In any event, there seems a curious discrimination implied in the question between kinds of property rights, that in some way creative property rights have a statute of limitations applied, that I do not think represents a just understanding of the facts. If a man buys a farm with no expectation that it will be more than a farm and develops it and passes it on to his family, and two generations later, oil is struck on that farm, no one suggests that because he had no expectation when he bought the farm that there would be oil on it, that his heirs, should not participate in the profits from the sale of that oil. I think whatever the complications of determining how much of the license fee would be passed from the manufacturer to the consumer, to the audience, the fact is that there is a property right involved. The VCR is sold for one reason only. The Japanese company that makes it is able to charge $500 to $1,000 for it, because it can record entertainment. That entertainment for that market is not paid for. Now, that seems to me an inescapable fact, and it is what has brought me here this morning.

Senator SPECTER. I think when you come back to the property rights issue, you are on the central point, but I think that has to carry with it a recognition and a concession that the consumers are going to be paying these fees as they come down, and then, the issue is what is fair. And I think we are prepared to tackle that, but I am surprised, frankly, to hear so much emphasis on a contention that the consumers are not going to be asked to pay this. But I think we have to say that they are going to be, at least to some extent, and then answer the question what is fair.

When you give the example about striking oil, that is a good example. But as we structure the laws, if the profits become excessive, we pass a windfall profits tax, and there are all sorts of gyrations that go through the Congress to affect property rights in many, many ways. I was very much impressed with your testimony and on the three points that you seek to make, where you talk about seeing to it that the consumers are not violating the copyright laws. I do not know if there is too much concern about that, but I think that is a lofty and worthwhile objective. It would certainly be impossible to prosecute those violators in any extent, because of massive efforts. When you talk about the industry concerns, you put it under the category of viability of the industry, and you put it under the category of a steady stream of entertainment, and I think those are worthwhile objectives. For my own analysis, I would seek to find an accommodation to recognize those objectives, because I think entertainers are important, and they are entitled to the fruits of their labor. But I keep coming back to a cutoff point. You do not need to compensate Ms. Mitchell's heirs or David O. Selznik's heirs, in order to have a viable industry today or to have a steady stream of entertainment.

Mr. HESTON. That is certainly true, Senator.

Senator SPECTER. And I come back, as a doctrine which goes through the law at all levels, to expectation. It is a very, very heavy doctrine which is with us at all times. And I am looking for some cutoff point, quite frankly, as I give this preliminary thought. Certainly, those who make movies in 1982 expect to have profits from television. I think that is so in 1970, and probably so in 1960. I am not so sure about 1950. I am pretty sure about 1930, that they were not. I might even be positive about 1920. And my question to you, to follow up what we discussed yesterday, is, do you think that there would be some fair, just line that the Congress could make on some cutoff points?

Mr. HESTON. I think so, Senator—although I feel strongly about the sanctity—I do not think is too strong a word—of the basic property rights. This Government depends on compromise, this Senate operates on compromise. As Mr. Valenti has suggested, once the principle is recognized that creative programing used on VCR's represents a property right, then almost any kind of compromise could be reasonably arrived at. Frankly, I feel, and I think Jack Valenti agrees with me, that I would just as soon not occupy the time and energies of this distinguished committee if we could somehow persuade the men who manufacture this equipment that they are not going to go scotfree into this market, that then you could say, "You fellows go and work it out between yourselves, but you must come to some agreement." I think that could be done. I would welcome the opportunity to take part in such a discussion.

Senator SPECTER. Mr. Heston, if you were to draw the line as I have suggested on expectations, at what point would you say it became an expectation of the movie industry that there would be profits from replays on television?

Mr. HESTON. The first contract negotiated by the Screen Actors' Guild that examined the question of replays of old movies on television was negotiated when the current President of the United States was President of the Screen Actors' Guild. They disposed of all films made before 1948, in terms of the rights of those who made them to share in their profits when they were shown on television, by payment of a lump sum to the various guilds involved and to the Motion Picture and Television Relief Fund, and each successive negotiation has reexamined the question and obviously increased the payments to those who took part in the films involved in successive years. But films prior to 1948 was the first landmark.

Senator SPECTER. When was that negotiation?

Mr. HESTON. I think that was in 1960, but I would have to check the record.

Senator SPECTER. Well, are you suggesting that from 1948 on, moviemakers were looking for royalties from television replays, or would a closer date be the date of negotiations in 1964?

Mr. HESTON. No. Originally, prior to 1950, the studios took the position that television could be starved out, and they would not give them any old movies. The only movies—I am sure some of you gentlemen remember those days—the only movies you saw on television then were old British movies. That was the golden age of live television. That provided me and some of my colleagues with our first opportunities. But in the early fifties, the studios broke down and started to sell their movies to television, first for fairly small sums. But the question of compensating the performers, the writers, the directors, who actually made the films additionally was debated fiercely through many rounds of contract negotiations by all the creative guilds, and it took some years to arrive at the compromise I have outlined.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

Senator MATHIAS. Thank you. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Valenti, I think you have made a good case. I think that people in the movie industry should be compensated for their artistic creativity. I, however, share some of the concerns that have been articulated by some members of this panel. I'm wondering, for example, if there shouldn't be limits on the fees that are charged on purchases of tapes or VCR's. Could you enlighten this committee a little by telling us about the Copyright Tribunal—that is, who are they, how are they selected, and what do they do—secondly, could you address the question of what criteria are used when the tribunal decides what the royalties should be and how they are allocated; and third, describe to us the tribunal's current experiences with cable TV and jukeboxes, and tell us based on those experiences what are the difficulties that might arise with tapes or with VCRs.

Senator MATHIAS. Would Senator Baucus yield, just to let me tack on one additional facet to the same question, really. Would the criteria be any different than if this committee undertook to do the job, and do you think the committee, using those criteria, could do it in less than the year that the amendment contemplates?

Mr. VALENTI. No; I do not think the committee can do it, Mr. Chairman, not because you are not capable of doing it, but because the many demands on your time, probably prevent you from looking at this issue in an analytical, methodical, and exhaustive way. The CRT, I believe, can do that. Its track record so far, though maligned by some; at times, I have disagreed with the CRT, not for its incapability of doing its assigned tasks, but for inserting itself in the free marketplace. I did not want a compulsory copyright license for cable. I thought we could deal with 4,000 cable systems. The reason why I am for compulsory license in this case is that we cannot deal with 40 million American homes, so administratively, we have to go the compulsory license route. But in every one of its decisions that the CRT has made since its inauguration as an agency, it has fulfilled its duty on time. Indeed——

Senator BAUCUS. How much time?

Mr. VALENTI. Before the time had expired that Congress had mandated. The Congress required that within a year, the CRT must come down with a decision. The CRT has met that standard. There have been six court appeals by affected parties, and the three judicial decisons handed down to date have all affirmed the CRT. That is, the court of appeals has said the Copyright Royalty Tribunal was correct. Two appeals are pending right now because they were filed recently. The District of Columbia Circuit Court just recently upheld the CRT and it is typical of the court's finding with respect to the Tribunal. They said, "The Tribunal's decision has achieved an initial allocation of the fund that is well within the bounds prescribed by Congress." In other words, as far as the CRT is concerned, it has met its obligations; it has met the warrant given to it by the Congress.

There are five members of the Tribunal. Four of them were chosen by President Carter; one has been chosen by President Reagan. They serve standard terms of, I think, 5 years. I think they make $57,500 per year. They have the capacity to hire experts and to do the job right. The cost of distribution of funds comes from the copyright pool itself and not from the taxpayer.

Senator BAUCUS. Is there any limit, though, on the fees that they could assess?

Mr. VALENTI. Not in the Mathias amendment.

Senator BAUCUS. None whatsoever?

Mr. VALENTI. No, sir. The Mathias amendment says "fair and reasonable," and my judgment would be that if egregious fees were set too low—and that could very well be the case, Senator Baucus—or too high, that somebody would appeal this to the court, saying, "This is a blunder, and we have been outraged by it, and we want our grievances addressed."

Senator DOLE. Could I ask, what happens during the appeal? Is the fee stayed, or is it imposed?

Mr. VALENTI. I think levy or distribution of the fees would be stayed until the courts have acted; that would be my judgment.

Senator DOLE. That would take a while.

Senator BAUCUS. Have any litigants claimed that the Tribunal set excessively high fees with respect to jukeboxes or pay TV? Has that charge ever been litigated in the courts?

Mr. VALENTI. There has been one mechanical rate review that was affirmed in the courts in April of 1981. There was a jukebox review that the CRT won in April of 1982. I am not totally and specifically familiar with the contents of that; I could get it for you. But essentially, whatever the dispute was, the court of appeals said the CRT did not err and acted properly.

Senator BAUCUS. What criteria do you personally envision the Tribunal using in trying to properly assess tape and VCR fees?

Mr. VALENTI. My judgment would be that we would, in a year's evidentiary hearing, present our case. For example, we would show how a network's revenues are bound to go down. The Frito-Lays of the world will multiply, like a rabbit warren; no advertiser is going to pay money for an audience not reached. We would show how this would affect all other areas of the marketplaces which we must, of course, have access to in order to recoup our investment and make a sufficient profit to go back and reinvest. So I would assume that we would do what any normal inquiry in such a situation would compel us to do. Our economists, polling experts, and legal experts would present our case for some kind of incentive to replace these vanishing markets precipitated by the VCR.

Senator BAUCUS. Let us assume the DeConcini bill passes, but without the Mathias amendment. What percentage difference will that make in a movie actor's income?

Mr. VALENTI. I will let Mr. Heston respond—I think that is a difficult question to answer. If it is passed——

Senator BAUCUS. I mean, are we talking about a 1-percent, 10-percent, or 30-percent difference?

Mr. VALENTI. Senator, I do not think, frankly, that you can quantify it at this time. I think we need to use common sense on it. We believe that there are going to be 20, 30, or perhaps 40 million VCR's in several years. We know that many users will be taping for a permanent collection. We know that 87 percent will be erasing commercials. We know this now. Advertisers know this. There is no question in the mind of anybody in this field who applies common sense that copyright owners' revenues and net worth will decrease. It is quite possible that, for example, the theaters will be hurt by VCR taping. Theaters are our major market. The same thing will happen to pay cable or other markets. As Mr. Eliasberg said, there is only a certain amount of leisure time that people have in a day. Instead of going out to the movie, people will watch something that was available on pay cable a few nights before. That is why the theaters are testifying. They see their own revenues eroding. And the same thing happens all the way down the line. You are inserting a new distribution system that is unlicensed in the marketplace.

Mr. HESTON. Senator, with respect, may I add to Mr. Valenti's response?

Senator MATHIAS. Certainly.

Mr. HESTON. I realize it is not easy to take very seriously the financial problems of movie actors when most people think of movie actors as me and Robert Redford. But the fact is, the 55,000 men and women who make up the membership of the Screen Actors' Guild constitute one of the most underemployed and underpaid group in organized labor. Last year, 76 percent—that is more than three-quarters—of the membership of the Screen Actors' Guild made less than $2,500. Now, I suggest even a 5-percent reduction in that income becomes serious. There is a very serious decline in motion picture production right now. Most of the membership cannot go outside the Guild jurisdiction and work in England, because they will not be hired there. Most of the membership makes what income they make from television commercials. I realize most of us regard television commercials as something of a nuisance and the capacity of the VCR to erase the commercials may be a welcome boon. I confess I feel that way myself. But network television, on which the bulk of the American public depends for almost all of their entertainment, is paid for by television commercials. And most of the money made by the members of my Guild is made from television commercials.

Senator BAUCUS. Well, I am glad you made that point, because I think the popular conception is that most actors are very well paid.

Mr. HESTON. Yes. It is hard to take our financial problems seriously.

Senator BAUCUS. Turning back to the Tribunal, Mr. Valenti are there any specific criteria that you would recommend that we incorporate into this bill? What I am driving at is whether, in your judgment, you think that the present latitude given the Tribunal works well, or whether you think we should have specific criteria that the Tribunal should be required to apply.

Mr. VALENTI. Well, I think that there are some specifics you can look at. First, regardless of harm, there is the unlicensed use of the product. Somebody is using property that belongs to someone else. I think it is well settled in this society that nothing of value is free. Of that you can easily convince the public. You do not have to be an orator or a great persuasive talker to convince the public that it is in their interest to take somebody else's property free of charge. That is not the way it works. So use is a factor to be considered in establishing the level of the royalty fee.

A second factor would be the benefit to the manufacturers of tape and VCR machines. They are getting enormous benefit. For example, the three big Japanese manufacturers earn 33, 34, 35 percent return on stockholders' equity. The Fortune 500 median for our most productive enterprises is 14 percent in this country. So the manufacturers of recorders and tapes are receiving a very favorable return, vis-a-vis stockholder equity, at a rate of two or two and one-half times that of the Fortune 500. Thus, there is great benefit to the VCR manufacturer. That is the second criterion that CRT could look at.

A third factor might be the harm to copyright owners—the demonstrable harm that comes from these little technological gadgets that expunge commercials, distasteful though some commercials may be. Commercials are the sinew, the blood, and the bone which fuels the whole television industry. Without them, everybody would be on pay television presumably, of course, they could afford it. I think it is an explosive political issue, Senator. By 1990, one-third of Americans will not be on cable, and two-thirds will not be on these machines. They are going to depend on free television for their home entertainment. So that is another criterion.

And finally, the marketplace value of these copyrighted works. What is the value? All four of those criteria, I think, can be examined effectively and with careful scrutiny, and I believe that it is possible for a Government agency, experienced in the copyright field and in reviewing this type of evidence, to look at what experts bring to them and be able to make some decisions which are reasonable. The Mathias amendment specifies "appropriate and reasonable royalty fees." Those are well-known legal terms. "Such fees shall be calculated to afford the copyright owners of motion pictures and other audiovisual works a fair compensation for the use of their creative works." Now, each one of us looks at those words—fair compensation—through a different prism. But essentially, they mean equity, justice, reasonableness, and fair-minded men and women, I think, can make those judgments.

Senator BAUCUS. Well, I do not want to take anymore of the committee's time. I think that you have made your case well. There is no doubt in my mind that this equipment would not be manufactured, sold, and consumers would not purchase it but for the creative work of artists. And consumers and producers are not paying for that today, and I think they should.

Second, beyond that, I think we should do what we can in our country to encourage artistic creativity more than we are; it would not only be better for the country economically but good for the Nation's soul.

I will not take anymore time with more questions, but I do suggest that we examine the possibility of including criteria in the bill that would assure that we do not permit the Tribunal to charge fees that are excessive.

Thank you, Mr. Chairman.

Senator MATHIAS. The Senator from Kansas.

Senator DOLE. I have no other questions, but I think in line with Senator Baucus, I had my own question about how the proceeds may be distributed if in fact this legislation should pass in some form. To repeat, if in fact there is a possibility of avoiding any government participation, if it can be somehow negotiated with the makers of the machines—I note that there may be one or two representing the Japanese in the room—maybe one or two are not representing the Japanese in the room—but in any event, we would be pleased to discuss that with anyone.

Senator MATHIAS. I would say I think that is a serious suggestion, because we never would have gotten the enactment of the copyright revisions of 1976, if it had not been that there was, in fact, an industry reconciliation which was finally brought back to the Congress and which, in essence, we adopted. So it is an extremely important element of the whole legislative process.

Mr. **Valenti**. Senator Mathias, I subscribe to all that Chairman Dole has said and you and Senator Baucus have said. I just want to issue one modest cautionary note. I do believe time is of the essence. If we are laggard in addressing this problem, we are going to watch the American entertainment industry be devastated by technological developments.

Senator **Mathias**. Absolutely. And I do not think this committee can wait, because you are dealing with a problem of a relatively limited number of machines in proportion to the population of the United States.

Mr. **Valenti**. That is right.

Senator **Mathias**. But when this gets to represent 20 or 30 percent of the population, then you begin to get a political and economic problem.

Senator **Dole**. It becomes like social security, then.

Mr. **Valenti**. And, Mr. Chairman, I also want to mention the audio industry. I do not want to leave audio out. They will represent themselves to demonstrate how they have been terribly and visibly wounded by the home recording phenomenon. They need help now. We and they cannot wait. We are linked together in the immediacy of this moment.

Senator **Mathias**. And that, Mr. Valenti, is why we are here. But the immediacy of this moment is such that we had better get on with the next panel.

Thank you very much, gentlemen.

Mr. **Heston**. I thank the committee.

Senator **Mathias**. Our next panel will be led by the Honorable Charles D. Ferris; Nina Cornell, Richard Anderson, Carol Tucker Foreman, and Eugene H. Kummel.

Mr. Ferris, who in a former incarnation, ran the whole Senate, should be able to help us see the light on this subject.

STATEMENT OF A PANEL, INCLUDING: CHARLES D. FERRIS, COUNSEL, HOME RECORDING RIGHTS COALITION; RICHARD ANDERSON, PRESIDENT, SEA COAST APPLIANCE DISTRIBUTORS, INC.; NINA W. CORNELL, PRESIDENT, CORNELL, PELCOVITS & BRENNER ECONOMISTS, INC.; EUGENE H. KUMMEL, CHAIRMAN OF THE BOARD, McCANN-ERICKSON WORLDWIDE; CAROL TUCKER FOREMAN, CONSULTANT, HOME RECORDING RIGHTS COALITION

Mr. **Ferris**. Thank you, Mr. Chairman. I certainly hope to be helpful. Each member of the panel will introduce themselves, give their affiliations and background; Mr. Chairman and members of the committee, in the interest of saving time. I ask that my prepared statement be inserted in full in the record.

I am Charles Ferris, and I represent the Home Recording Rights Coalition, a group of American and U.S.-based international companies and American trade associations involved in the manufacture, distribution and sale of video cassette recorders and blank tapes, and the sale and rental of prerecorded tapes and related equipment.

Our position, Mr. Chairman, and members of the committee, is to urge the swift adoption of S. 1758, the DeConcini bill, which would exempt from copyright infringement the private, noncommercial use of the video cassette recorder.

The royalty bills and the royalty amendments purport to exempt home taping from copyright infringement. In fact, however, they charge the consumer a hefty price for the exemption, making it no exemption at all. And since copyright holders are already fully compensated by the marketplace system now in place, the royalty tax is really nothing more than a means of paying twice at the expense of the American consumer.

The issue simply put is, will the public be permitted to view programs licensed and paid for and lawfully received for viewing in the privacy of their own homes when convenient to them, without additional payment.

We believe that the copyright holders, the motion picture producers, should be compensated fully for their creative works—indeed, we believe they are—and that the present methods used to compensate them will fully adjust to a changing marketplace now and in the future.

Let me explain how a movie producer presently receives a copyright fee. The movie producer and the purchaser of a viewing right, whether a theater owner, a pay cable operator or a pay TV broadcaster, or the dealer and seller of prerecorded video cassettes, determine the size of the royalty when they negotiate the sales price or license fee. And it works the same way for television, Mr. Chairman. The movie producer determines the royalty fee, when a price is negotiated with the broadcaster to permit the airing of that movie on the public airwaves. The choice to use the over-the-air, so-called "free" TV is entirely within the control of the movie producer. When that choice is made, the premises of that medium, the public airwaves, must be accepted—premises dictated by the Communications Act, which is driven by the principles of the first amendment that favor the widest dissemination of the information transmitted. That driving force of the first amendment is also consistent with the economic premises of the broadcaster and the advertiser to reach the widest possible audience.

Video cassette recorders enhance those underlying constitutional and economic premises, and let me explain how.

First, VCR's permit viewers to receive the programs intended for them, but to view them at their convenience. The rating services, Arbitron and Nielsen, both count video cassette recorders as viewers, even though the VCR is capturing a program while no one is watching it. And the number of viewers as determined by Arbitron and Nielsen is the basic information that ultimately determines the gross audience. That figure, gross audience, determines what advertisers are willing to pay to broadcasters and what broadcasters are willing to pay the copyright holders, the movie producers.

I might say parenthetically, Mr. Chairman, at this point, that there is no evidence that VCR viewers watch fewer commercials than real-time viewers.

Surveys clearly show that the video cassette recorder is now used primarily for time shifting—recording off TV a program to be viewed later. The VCR frees the viewer from the rigidity of the daily TV schedule and permits viewers to watch their favorite programs at their convenience. Unfortunately, that use, time shifting, is now illegal under the ninth circuit court of appeals ruling of last October.

S. 1758, the DeConcini bill, would remove that cloud of illegality and permit 10 to 12 million VCR users to come back within the law and at the same time assure the continued benefit this technology provides consumers and the entertainment industry alike.

A royalty is received for free TV by the movie industry—a royalty that is adjustable to marketplace forces as the size of that gross audience expands. The question is, do VCR's expand or contract the gross audience figures of TV? The only evidence available and the only conclusion that can be reached is the VCR's expand the gross audience. The lure of VCR's into the home, Mr. Chairman, is for time shifting, the convenience of viewing at one's own choosing. But once in the home, the VCR provides a valuable new market for Hollywood, the prerecorded video cassette.

The New York Times of January 20 reported, in its analysis of the economics of the movie industry, that the eight largest production studios in Hollywood will receive more revenue this year from this prerecorded video cassette market than from the licensing of their movie products to the three commercial networks.

Mr. Chairman, there is no harm to Hollywood. The court found no harm. The witnesses admit in this case that there is no present harm. They seek legislation based upon a faulty hunch of some future harm. The VCR is a friend of Hollywood, and as Mr. Heston testified today, the movie industry perceived of television as a threat in the fifties and tried to starve it. The movie industry perceived cable as a threat and tried to regulate it into submission. The VCR is the present threat as perceived by Hollywood. It is not a threat. It is going to expand and benefit, by expanding the gross audience, in time shifting and creating a new market for prerecorded video cassettes.

There is no justification for a surcharge on the American consumer, earmarked for the Hollywood producer. Mr. Chairman, any other proposal seeking additional copyright compensation mechanisms should be able to be justified on its own merit—not as a tag on legislation that would remove the cloud of illegality for millions of Americans who wish to use their VCR's to permit them to view programing when it is most convenient for them.

The marketplace works, Mr. Chairman. I submit to the committee that we should not gum the marketplace up with a Government agency.

We urge the swift passage of the exemption included in the DeConcini bill.

Senator MATHIAS. Thank you, Mr. Ferris.

[Prepared statement of Charles D. Ferris follows:]

PREPARED STATEMENT OF CHARLES D. FERRIS

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.

Mr. Chairman, Members of the Subcommittee:

My name is Charles D. Ferris. I appear before you today as counsel to the Home Recording Rights Coalition.

I appreciate the opportunity to present our views to you. I appreciate as well the efforts of this Subcommittee to explore fully the range of issues that have been raised as a result of the Ninth Circuit's decision in the *Betamax* case.

The Coalition's position is that Congress should proceed speedily to enact an exemption to the copyright laws for the private, non-commercial video taping of television programs. We hope that it will.

Mr. Chairman, the Coalition asks the Congress to take this action fully confident that our position is clearly in the interest both of American industry and, equally important, of the American public. VCRs have become a critical element in the revolution taking place in home communications. This technology will free people from the artificial confines of network scheduling, permit them to receive new and diverse sources of information and ultimately open up a vast and still largely unexplored frontier of additional uses for video recorders, such as home movies and many innovative business and educational uses.

The current video marketplace has adequate mechanisms to compensate copyright holders fully for the use of their works, so that any additional tax or royalty would be a huge windfall for Hollywood producers by requiring consumers to pay twice for the same program. The very same mechanisms that underlie compensation for program producers in the commercial television system, the ratings services, already include VCRs in their audience survey data. Advertisers pay for these "extra viewers," so VCRs actually increase the audience for particular programs and, therefore, increase the actual compensation copyright holders receive.

In summary, Mr. Chairman, we believe that the tremendous service that VCRs provide the American people in the video marketplace is one important factor in determining whether their home use should be viewed as a "fair use" exemption to the copyright laws. The ultimate goal of the copyright law is to promote the First Amendment value of increased access to diverse speech. This same goal is furthered by the unfettered availability and use of VCRs. Copyright holders are not harmed by such use, as was noted by the District Court. In light of their benefits and the absence of harm -- indeed, the substantial gains -- to copyright holders, we believe Congress should follow the reasoning of the Disrict Court in the Betamax case and grant an exemption to the copyright laws for the home use of VCR.

Mr. Chairman, I would also like to share with the Subcommittee the Coalition's grave concern over the impact of the proposed royalty fee. Beyond the fact that it would be an enormous windfall, we believe it would be inefficient and inequitable. It would distort and inhibit the evolving communications marketplace by favoring other technologies and regulating only this one. Because royalty taxes would add significantly to the cost of recorders and tapes, they would also stunt the growth of this new retailing and manufacturing industry, threatening the very existence of the nearly 25,000 small businesses that are totally dependent upon its vitality and impeding new business opportunities for broadcasters and independent producers.

Coalition for Home Recording Rights

The Coalition is a diverse group of companies and associations involved in the manufacture, sale, and distribution of video cassette recorders, blank tape, and related equipment.

Formed in response to the Betamax decisions, the Coalition includes such companies as RCA, which is the company with the largest share of the American VCR market, G.E., 3M, Pfizer, DuPont, Sony Corporation of America, Matsushita, J. C. Penney, and Sears, Roebuck & Co. It includes such prominent trade associations as the Electronic Industries Association, the American Retail Federation, the National Retail Merchants Association and others, representing thousands of retailers, large and small, from all over the country.

Together these many companies and associations represent a new and growing segment of the American economy, one that already employs thousands in every part of the country and one that will, if left to grow naturally without unwarranted government interference, employ tens of thousands in the near future. The VCR industry and its offshoots even in their infancy contributed an estimated $3 billion dollars to our economy last year. This sum will eventually be dwarfed by the predicted growth of these industries and does not even include the explosive growth of the VCR's contribution to movie studio revenues from the sales of prerecorded cassettes. They form one of the few areas of the American economy that can truly claim to be gaining strength at a time when others are faltering and, sometimes, even failing.

But these industries are at a critical juncture. While their prospects were bright not so long ago, the Ninth Circuit's opinion in the Betamax case has created a whirlpool of uncertainty.

Indeed the diversity of our growing membership demonstrates one central fact: the controversy over the application of copyright laws to home video recording concerns the American business community deeply. The companies and associations that comprise the Coalition have made the passage of an exemption a legislative priority. They are devoting their time, energies and resources to this issue because, in their business judgment, the Ninth Circuit decision has created a crisis. These companies and associations are concerned because this unwise and unjustified decision has caused turmoil in the video recorder industry by creating uncertainty in the minds of American consumers. No one knows better the marketing climate created by the Ninth Circuit's decision than those who must do business in it. We all believe that quick action by the Congress is essential to warm the chilling effect of that unfortunate decision.

The VCR and the Communications Revolution

The Coalition is also deeply concerned, Mr. Chairman, that the efforts by some to extract additional but unwarranted revenue from this new communications technology will prevent it from fulfilling the rich promise it offers to the American public. It is now clear, after many years of high risk investment and uncertainty, that the VCR is becoming an increasingly important part of the communications revolution. In the sometimes dizzying search for diversity in new program sources aired through new distribution mechanisms, VCRs offer a wholly new type of diversity: time diversity.

Today, the VCR owning public is no longer bound by the time schedules of the networks. This new technology provides the public with access to sources of information previously not available to them. This is as important a new source of information to them as would be the addition of many new channels of over-the-air television or cable.

People who previously had to choose between watching two quality shows being shown in competition with each other can now watch one while they record the other for viewing at a later time. VCR owners who were away from home for one episode of "Brideshead Revisited," for instance, did not need to miss that episode completely but could record it for viewing when they arrived home. That same VCR owner faced a less troubling decision than those without VCRs two weeks ago when the NCAA basketball championship game and the Academy Awards were showing opposite the final episode of "Brideshead."

For similar purposes, Action for Children's Television, among other groups, is an active supporter of VCRs, because these machines allow families to recover children's programming from the darkest recesses of the networks' schedules and move it to times when children are home from school or no longer asleep. Children's programs can also be taped for later viewing while adults watch a conflicting program.

The VCR also offers completely new possibilities for the broadcast marketplace. It can, for instance, open up the graveyard portion of the broadcast spectrum to greater use. TV stations can broadcast programs in the early morning hours that can be taped through an automatic timer mechanism while the household is asleep and replayed during waking hours.

The VCR also promises to break down the existing production bottleneck for creative talent seeking access to the television consumer. Indeed, it may be this aspect of the VCR's potential that most disturbs the major movie studios. For many years they have tightly controlled the flow of creative works to the nation's movie theaters and over the nation's airwaves. They may not similarly control the prerecorded video tape market. This technology offers a low cost, low risk means for new artists with new ideas to enter the programming market and compete head to head at the home viewing level with those who control the other avenues of program distribution. The breakdown of that programming bottleneck may be the VCR's greatest promise to the American public.

VCRs Increase the Economic Rewards for Copyright Holders

We also believe that allowing the public to use VCRs without the threat of copyright law violations and without artificial taxes or royalties will not hurt, but will, in fact, increase the economic rewards that copyright holders currently receive.

Therefore, even on the reverse side of the scale -- the potential harm to the copyright holder -- VCRs are an asset, not a threat. Indeed, we believe that VCRs are one of the best friends Hollywood has ever had.

All the available evidence strongly suggests that copyright holders are not adversely affected at all by VCRs -- and without adverse harm there is no reason to impose regulation and taxes on the current video marketplace. Indeed, we believe that the current marketplace functions in such a way that copyright holders are vastly benefited by VCR usage.

What I would like to do, Mr. Chairman, is briefly describe to you how the video marketplace functions for each of the ways in which VCRs are used. In doing so, however, I do not want to lose sight of one critical point about economic rewards that has been completely ignored by the Hollywood representatives, but one that I am quite sure they recognize when they evaluate their own bottom line. Hollywood spokespeople have tried in this legislative debate to get people to look only at certain aspects of the impact VCRs may have on the video market -- the impact of taping off-air -- and to ignore others. Yet an accurate picture of the VCR's effects on incentives and economic rewards requires an analysis of what this technology does for the marketplace as a whole.

It is clear that VCRs have not in fact hurt the copyright holders' television markets but have actually helped increase their economic rewards. VCRs are used by the public in four ways -- time shifting for broadcast television viewing convenience (approximately 80% of the use), taping from pay cable and other forms of pay TV, making home movies and other non-infringing uses, and playing purchased or rented prerecorded cassettes. The latter two types of uses, of course, are still permissible under the Ninth Circuit's opinion, and the pay television question has not been addressed by the courts. As each category is analyzed, however, it becomes apparent that the video marketplace has or can adjust to and fully compensate copyright holders for any type of use of VCRs.

VCRs Are Primarily Used for Off-Air Time Shifting

The desire for increased time flexibility, studies clearly establish, is the overwhelming reason why people purchase VCRs, and, in fact, is how they use them once they own one. The 1981 Media Statistics Diary Study found that 77% of all programs recorded at home were recorded while no television was being watched or while a different program was being watched. Another 1981 survey found that time shifting, taping a program for viewing at a more convenient time, was cited as their primary use of the VCR by nearly three times as many VCR owners as the next most mentioned use, viewing prerecorded tapes (Mart Magazine, 1981).

The use of the VCR for time shifting not only provides compensation to the copyright holder but, in fact, increases the compensation that the market provides. The two principal television ratings services, Arbitron and Neilsen, both count operating VCRs as actual viewers. Their decision to do so reflects the simple fact, accepted by advertisers, that "time shifters" view the same commercials with the same impact as does anyone else. Thus, an operating VCR is a part of the audience figure upon which advertising rates are based and for which advertisers pay. Since the amount of compensation paid by a broadcaster for the right to show a program is based upon these rates, and since these rates reflect VCR usage, a copyright holder is clearly being paid for the VCR use. Moreover, they are receiving even more money because of VCRs, since these machines increase the audience for any particular show. The district court found this in its decision, based on the facts in evidence before it.

It also appears from all the available evidence that, despite unproven claims to the contrary, there is actually very little library building among VCR users. The usual pattern is to view a recording one time and then re-use the tape for further time shifting. One survey found that 87.6% of the most recent recordings VCR owners had made were recorded over a previous recording, and that 66% of those previous recordings had been watched only once before being erased. (Crosley Surveys, Inc. 1978). A comprehensive study by the FCC[*] also concluded that this was the most common pattern of VCR usage.

Indeed, the evidence indicates that most VCR owners keep very little recorded material on hand. The Field study found that 56% of VCR owners had fewer than 10 recorded tapes, and that small figure included both original and non-copyrighted material. In fact, other survey evidence indicates that about half of a normal homeowner's tape inventory is composed of tapes that are used and reused for time shifting.

Even when recorded material is kept, it is maintained for only a short time. Seventeen percent of VCR users never saved a taped program longer than a month, and an additional 62 per cent had done so no more than 10 times (Kalba-Bowen Associates Study). An Arbitron study concluded that only 18.1% of users planned to keep their recent recordings. The cost of blank tape is sufficiently high that it provides a healthy incentive for erasing and re-using those tapes that one buys.

I should note in passing, Mr. Chairman, that survey evidence showing how long people keep a tape is not all that it might appear to be. For instance, one might tape a TV show for time shifting purposes, watch it soon thereafter but not tape over it again for a month or even longer. Is that librarying? Certainly not in any meaningful sense.

Most taping appears to be of "series" programming. To build a library of all or even a substantial part of the episodes of a series would be prohibitively expensive. It is, moreover, doubtful that anyone would collect only a few episodes, and, if they did, it is unlikely to have any measurable effect on the rerun market.

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[*] Network Inquiry Special Staff, Federal Communications Commission, Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players in the United States (1/11/79).

There is very little evidence to suggest that a significant number of people compile libraries of off-the-air movies. Most movie taping is also done on a time shifting basis. Thus, just as with series programs, time shifting of off-the-air movies does not hurt but actually helps the copyright holder.

These movies are, of course, filled with commercials, cut and edited for television, and susceptible to poor reception. They make poor collector's items. Moreover, the cost of taping such a movie can also be relatively high, an important consideration since the growing rental market offers full-length, uncut movies at an earlier time at a lower per movie cost.

Finally, even if libraries of such movies were being compiled, they would affect the movie's value at its least valuable stage of distribution. A movie is, after all, only released to commercial television after it has exhausted its value in theaters, video cassettes, and pay T.V. or cable. If a movie is taped off television and stored, it is, presumably, taped from the first commercial airing. The storage of that movie at most can affect the second or third showing of the movie on television, an effect that assumes an individual would have watched or would even have been home to watch the movie a second or third time.

Most viewers of a movie shown on air for the second or third time are watching it because they missed it the first time. The holders of copyrights to these movies benefit from VCR use because a person counted as viewing a movie the first TV run is worth more than a person counted as viewing it the second or third time.

Pay Television and Pay Cable Movies

Just as the market accounts for the most prevalent uses of VCRs, it also accommodates and compensates the taping of movies from pay television and pay cable services. Initially, it is unlikely that taping of these services will have any effect whatsoever on this market. Pay TV services already schedule a first-run movie several times during the first month it is aired for convenience viewing. The VCR merely assists in this process. After all, no matter how frequently it is scheduled, there is no guarantee that a viewer's favorite movie will begin just after the baby finally falls asleep. The market for reruns of these movies on broadcast television will be unlikely to be affected, since those consumers who subscribe to pay services do so precisely because they wish to watch uncut, uninterrupted movies and do not want to wait for broadcast viewing of them.

In addition, VCR owners who wish to tape pay movies may well place a higher value on obtaining the pay service than those who do not wish to tape. The cable/pay television operator can therefore extract more revenue from these consumers through higher subscription fees because of their willingness to pay more. Copyright holders in turn will demand and receive a higher price for their product.

Taping of pay movies for storage is not, however, likely ever to become a widespread phenomenon. Given several repeats of a movie on a pay service in a month, the viewer's appetite is likely to be saturated for quite awhile. The price of purchasing a tape to store a movie will continue to equal if not exceed the cost of later renting that movie from a retail outlet if his or her taste for it ever returns. Movies, unlike music, tend to be consumed only a limited number of times. The idea that people will amass large quantities of movies to view over and over again is unrealistic and contradicted by the evidence.

Non-Infringing Uses

There are a large and increasing number of VCR uses that do not infringe copyright in any way. The steadily decreasing price of portable VCR camera units, for instance, has lead to an increase in the use of VCRs for the equivalent of home movies. In 1981, according to the Wall Street Journal, home video cameras outsold eight millimeter film cameras for the first time. Moreover, the proportion of VCR sales accounted for by portables, the kind of VCR used to make home movies, is rising. In 1981 it was 20 percent of total VCR sales; it is projected to be 35 percent in 1982. While figures are inconclusive, it appears that a growing portion of tape sales also are for this purpose. Such use does not involve any copyright issue, and it is difficult to imagine why anyone who uses a VCR for this purpose should have to pay a royalty on tapes or machines designed to compensate copyright holders.

There are, of course, additional non-infringing uses of the VCR, in schools, in sports lessons, in courtrooms, in corporate sales presentations, and in every field of business and leisure activity. All of these uses are a growing part of the reason that American consumers choose to use this new technology. These uses will multiply as the full potential of the VCR is exploited. The market does not and need not compensate any copyright holder for this type of use.

VCR's as Playback Devices

The final use of VCR's is to play purchased or rented prerecorded video cassettes. Reliable figures are hard to come by, since the major production houses use very complicated accounting methods, but a recent New York Times article revealed that in 1982 the largest movie producers will for the first time make more money from the sale of pre-recorded video cassettes than they make from the sale of their programs to network television. In 1981, revenues from prerecorded cassette sales equaled revenues from network television despite VCR penetration of only about 5 percent of TV households.

Thus, Mr. Chairman, when VCRs' total contribution to the economic incentives of Hollywood are put in full perspective, rather than viewed through the restrictive lens of Hollywood, it is clear that the introduction of the VCR technology has actually greatly increased the economic rewards for producers over those they received in the pre-existing video marketplace. Indeed, according to another New York Times article on the movie studios' attitudes towards video, all are counting on the new video technologies, particularly VCR's, to usher in a new golden age.

Mr. Chairman, the Coalition believes that the facts I have outlined thus far justify prompt enactment of an exemption to the copyright laws for the private, non-commercial video taping of copyrighted programs. We believe that such action is a compelling necessity in view of the Ninth Circuit's decision.

Fair Use: A Safety Valve for the Copyright Laws

Because the Coalition sees the bright promise of the VCR, both to the dynamic industry it has stimulated and to the American public who has warmly received it, and because VCRs have increased the earnings of program producers, we were understandably distressed by the unexpected reversal by the 9th Circuit of the district court's reasoned opinion in the Betamax case.

As you all know, Mr. Chairman, the district court, in an opinion that even the Circuit Court described as "elaborate, painstaking, and thoughtful," held that off-the-air home use video recording was permissable under the copyright laws because the legislative history of those laws implied that Congress intended to exempt home video recording. The court further held that, even under a contrary interpretation of this legislative history, the judicial doctrine of "fair use," as it is codified in the Copyright Act of 1976, permits such video recording.

Unfortunately, Mr. Chairman, this decision was reversed by the Ninth Circuit Court of Appeals on October 19, 1981. The

Ninth Circuit concluded that the legislative history of the copyright laws could not support a finding that Congress had exempted VCRs. The court held that Congress had never explicitly considered the home video recording issue, and that neither the Copyright Act nor its legislative history established that such recording was not within the set of exclusive rights granted to copyright owners in Section 106 of the Act.

Of more interest and importance, the Ninth Circuit came to a different conclusion than did the district court on the fair use question, holding that VCR use was not a "fair use."

Given that both courts relied upon the same factual grounding, and even viewed these facts in largely similar light, it is curious at first glance how such different conclusions could be reached on the fair use question, which is really the crux of the legal dispute. The answer, Mr. Chairman, is that the two courts had differing views of how the fair use doctrine should be used to accommodate new technology. The district court wisely perceived that the "fair use" doctrine functions as the safety valve of the copyright statute. It is the means by which courts can moderate the otherwise too harsh impact of the copyright monopoly and allow the public's interest in wider, non-harmful uses of a work to co-exist with the privileges bestowed by the copyright.

Indeed, it was the district court's view that Congress included Section 107 in the 1976 Act but left its criteria flexible just so that the Act could adjust to the changing demands of the future. In particular, the court noted the desire of Congress to use the "fair use" doctrine as the means to adapt an otherwise inflexible statute to technological change.

Had it not been for the unfortunate ruling by the Ninth Circuit, the "fair use" doctrine would in this case have accomplished that goal quite well. Instead, the Ninth Circuit took an extremely rigid, quite regressive, view of the fair use doctrine. In that court's view, the fair use doctrine accommodates the public's need for broad dissemination only if the use is done for a "productive" rather than an "intrinsic" purpose. And, while the Ninth Circuit appears willing to balance to some degree the public's needs against those of the copyright holder, it does not view "convenience, entertainment, or increased access" as among those productive purposes desired by Congress in enacting Section 107.

Mr. Chairman, the Coalition believes that the Ninth Circuit's harsh and formal view of the "fair use" doctrine is not only ill-reasoned but is as well contrary to the intention of this Subcommittee and the Congress as a whole. We believe that Congress wisely recognized in 1976 that the most serious tensions likely to be presented to the comprehensive copyright structure it was then creating would come from new distribution technologies. As the Reports of both the House and Senate emphasized, "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975)).

Congress, with the particular guidance of this Subcommittee, recognized that what was at stake in this confrontation was that an entire communications revolution, and the American people's access to increased sources of information, could be shaped -- or distorted -- by the manner in which copyright law adjusts to changing circumstances and the inevitable march of technology.

Like virtually all legislative actions taken daily by the Congress, the establishment of a copyright scheme involves an extremely delicate balance of competing interests. My good friend, Jack Valenti, is fond of and persists in saying that the sole purpose of the copyright laws is to insure that artists and creators can control their product and ultimately profit from it. Well, Mr. Chairman, he is wrong.

Rewarding artists is not the sole, nor even the dominant, purpose of the copyright statute. Balanced against the need for economic incentives for authors is the public need for access to their works. Indeed, it is clear that the system of private motivation established by the copyright laws is designed to serve the larger goal of promoting broad public availability of music, literature and other forms of informational and artistic endeavor. Compensation to artists is, therefore, not the rationale of the copyright system. It is only the means to the end of increased public access to the product they market.

Thus the real challenge is the necessary balancing act that must constantly be performed: how best to assure the widest possible dissemination of copyrighted works consistent with the preservation of adequate financial rewards and incentives for the continued creation of more such works.

Mr. Chairman, the Home Recording Rights Coalition firmly believes that the video cassette recorder is quite clearly and undeniably a technology that serves the public's interest in diverse information. It is by its very nature a device that enhances greatly First Amendment values of historic concern to the copyright laws. It deserves the strongest possible deference in any weighing of competing claims under the "fair use" doctrine.

Jack Valenti has often noted that the VCR destroys the copyright holder's ability to control his or her product. In fact, it is the copyright holder's decision to use the broadcast medium in the first place that results in the surrender of control. The loss of control that Mr. Valenti laments is thus not only voluntary but a fact of business, whether or not a VCR is used.

This is particularly true, Mr. Chairman, because the movie producers and copyright holders have freely chosen to distribute their wares in the public domain of the broadcast airwaves. They have thus moved their product from an arena in which copyright holders are paid directly by viewers and where they can exercise nearly total control to one where the actual buyers of their product, broadcasters and advertisers, favor the widest possible dissemination of that product. Widest possible dissemination, moreover, is the purpose of the broadcast spectrum and the requirement of the public interest which guides its use.

Copyright holders, if they so choose, even in a world filled with VCRs, can exercise all the control they need by refusing to sell to television at all, or by delaying the release even further so that revenue from other distribution mechanisms has been more fully tapped. Of course, the television market is so lucrative that few will make such a choice. But some have already. Walt Disney Productions, for instance, does not release its children's classics to television because they feel that exposure on TV will reduce their continuing value in movie theaters. Their decision, no matter its merits, is certainly an exercise of control. Thus, Mr. Chairman, viewing home taping of TV programs as a fair use will not only allow the laws to absorb the shock of a new and exciting technology. It will allow million of Americans to increase their access to vital information without harm or loss of control to the copyright holder. Sadly, the logic of this view is no longer the reality of the law. Instead of fair use, video taping has been branded illegal.

The VCR Owner: Hostage To Royalty Demands

Unless and until the Congress acts to enact an exemption, over 10 million video tapers will literally be breaking the law each time they use their VCR for the very purpose for which they purchase it. We do not truly believe that the federal prosecuter is going to pursue actively these law breakers -- although daily we read examples of overzealous prosecutors taking absurd actions.

But there is a more subtle, and in the long run more enduring, problem presented by the characterization of illegality that now falls upon video taping. Americans have once again been graphically presented with a law that appears to them, and to nearly all the newspaper editorials they read, to be plainly ridiculous. They are confronted, if they own a VCR and want to use it for time-shifting, with a choice between obeying the law and losing a crucial part of the value of their expensive recorder or ignoring the law completely.

It is a choice, Mr. Chairman, that should not be necessary at all. It is necessary only because the Hollywood interests choose to hold the VCR-owning public hostage to their demands for a complicated, expensive, and totally unjustified royalty scheme. They concede that individual liability is senseless; indeed, their bill would also exempt individuals. But they demand this "liberation" at a price.

We believe Congress should proceed to eliminate individual liability now, since it is not an issue of controversy. If a royalty proposal is to receive attention, it must be thoroughly reviewed and debated separately. The need to remove the stigma of illegality from home taping should not be frustrated by this debate.

Of course, the Coalition has serious reservations about any such scheme. We answer even the threshold question of whether it is needed negatively.

Would Any Other System Be Better?

Even if the video marketplace did not function perfectly in all cases -- and no market ever does -- no government intervention into that market would be justified unless it could provide a more efficient and accurate means of compensation. It is clear that a royalty scheme to impose taxes on recorders and blank tapes would be neither efficient nor at all accurate, would be an unjustified windfall, and would place the same tax on those who use their VCRs for admitted "non-infringing" uses as those who tape off-air.

As the members of this Subcommittee are aware, the Hollywood proposal would require the Copyright Royalty Tribunal to determine in the first instance an appropriate royalty amount to be levied upon the sale of recorders and blank tapes. Yet this first task would undoubtedly turn into an impossible quest for numbers that can probably never be established. Even the district court in the original Betamax case, where discovery and subpeona power were available, and where there was ample time to sift and evaluate the data, was unable to find any evidence of harm to the plaintiff.

Assuming that the Tribunal could make this preliminary assessment, the Hollywood proposals would then charge them with the responsibility to determine who, among the many potential copyright claimants, is entitled to how much. This second responsibility, like the first, promises to ensnare the compensation scheme in a regulatory web of red tape and delay. Moreover, even if the distribution of funds is not stayed during pendency of any appeal of the distribution formulas, the court battles themselve will impose real costs on the American society as parties will devote nearly as many economic resources to litigate their claims as they ultimately will derive in benefits from it.

At an even more fundamental level, however, this entire regulatory royalty scheme is burdened with an unalterable and, in my mind, intolerable flaw. Any royalty scheme will not change the compensation structure of the present marketplace. Royalties generated as a result of sales of VCRs and blank tapes would be additive to the revenues generated through the compensation already derived from VCR use. The copyright holders, therefore, would be the beneficiaries of an enormous windfall.

Nearly as troubling as this double compensation problem is the inequity of a royalty as applied to those who are not taping copyrighted materials. A standard flat fee on recorders and tapes will not reflect the variations in usage between those persons who are "infringers" and those who are not. More precisely, an individual who buys a VCR and blank tapes for the sole purpose of making home video tapes of his family or who only buys prerecorded tapes and never records at all will pay the same royalty tribute as does a person who is an avid off-the-air taper.

The Coalition is also, of course, extremely concerned about the impact of these taxes -- possibly as high as $50 per recorder and $1-2 per blank tape -- upon the sales of both VCRs and tapes. Mr. Valenti is fond of saying that the VCR industry is very competitive and will, therefore, not pass on the costs of this tax to the consumers. That is, I must say, one of the more novel economic theories forwarded in recent years. It is true that the VCR industry is competitive, and this competition has already driven prices down. Indeed, the VCR market is so competitive, and so close to the lowest profit providing price, that any universal cost increase will necessarily be passed on to consumers, just as an increase in the cost of shipping would also be passed through.

It is the extreme competitiveness of the entire video market that makes any price increase such a troubling prospect for this industry. The VCR industry is competitive not only within itself, but also with other technologies within the video marketplace. Among the VCR competitors must be considered pay cable, subscription television and multi-point distribution service (MDS), and, of course, video disc players. There is also some evidence that we compete for the same home entertainment dollars with Atari, Intellivision and other home video games, and with home computers as well. And, of course, since VCRs are not yet an "essential" item, the industry must remain competitive with the over-the-air broadcast system. For instance, the more time diversity or other program diversity offered over commercial TV, the less incentive a consumer has to buy a VCR to increase his or her access to diverse programming.

In such a competitive market, with even more competitors, like direct satellite to home broadcasting (DBS), coming into the market constantly, every price increase of any amount affects VCR and tape sales. At some point -- quite possibly at the level being suggested by the Hollywood interests -- sales will become sluggish and could stall altogether.

Such a possibility is disturbing not only to the manufacturers of VCRs and blank tape, not only to the large retail chains like Sears and J. C. Penney, not just to the over 25,000 small businesses whose very existence depends upon a growing VCR industry. It would be disturbing to the entire American public, who, if they do not now own a VCR, plan someday to purchase one. It would be disturbing as well to the video marketplace as again a new and promising technology becomes shackled by the heavy burden of unnecessary government regulation.

Mr. Chairman, I submit that what we are seeing here is no different than what we have seen each time a new communications technology is initiated that will increase the public's access to information and entertainment. The producers of artistic works are at the outset confused by this development, and unsure whether it is friend or foe. Comfortable with the status quo of the existing distribution marketplace, these interests at first attempt to throttle and confine the new technology -- to enjoin it, tax it, and paralyze its use. Until the producers and existing distribution media figure out how they can master and benefit from the new media, they will try to smother it in its cradle.

With hindsight, years later, everyone will understand what the furor was about, as it becomes clear with calmer reflection that the producing interests were again "crying wolf," as they did when they predicted that the advent of television would mean the end of movies, that television would spell the end of radio, or that cable television or over-the-air subscription television would destroy broadcast television.

We should learn from the past, not be forced to repeat its mistakes. The Congress, the courts, and the Federal Communications Commission have spent the last decade removing ill-advised restrictions from other forms of communications that expand the public's access to creative products, such as pay cable and subscription TV. In this era of deregulation, it seems out of step to seek once again to interpose a governmental agency into a freely functioning marketplace, which is working, and will work, to compensate fairly all deserving parties.

May 11, 1982

MEMORANDUM

To: Charles D. Ferris
Home Recording Rights Coalition

From: Nina W. Cornell and Michael D. Pelcovits
Cornell, Pelcovits & Brenner Economists Inc.

Subject: "An Assessment of the Impact to Consumers from a Royalty Fee on Videocassette Recorders and Blank Tapes," Prepared on Behalf of the Motion Picture Association By Robert R. Nathan Associates

The report, "An Assessment of the Impact to Consumers from a Royalty Fee on Videocassette Recorders and Blank Tapes", prepared by Robert R. Nathan Associates (RRNA), proports to show that "very substantial portions of a royalty fee imposed upon the manufacturers of VCR equipment and/or blank videotapes would be borne by manufacturers and retailers rather than consumers." Specifically, the RRNA report projects that initially (in 1984) only 21 cents of every dollar collected by the fee would be passed on to consumers, while eventually (in 1990) only 12 cents of every dollar collected would be passed on to consumers. This projection appears to be based on a systematic application of the basic principles of supply and demand to the question of who would bear the tax. Despite setting out some of the basic principles correctly, however, RRNA misapplies these principles in their analysis. Consequently, they greatly understate how much of a tax on VCRs or videocassettes would be paid by consumers.

The fundamental error in the RRNA report is its attempt to show that a competitive industry will bear a large share of the burden of tax, despite the well-known and easily proven proposition that except under very special conditions, a competitive industry will ultimately pass on almost the entire burden of a tax to consumers. The RRNA report, after explaining at length how competitive the VCR and videocassette industries are, then goes on to show that neither industry has the special conditions necessary to make it an exception to the general rule that consumers bear the burden of a tax on a competitive industry.

To project how much of a tax would be borne by consumers, RRNA must analyze both supply and demand conditions. Any tax imposed upon a market will ultimately be reflected in some reduction in the quantity produced and sold, and some increase in price. How large each of these effects are depends on how responsive supply would be to a change in costs and how responsive demand would be to a change in price -- what economists call the elasticity of supply and the elasticity of demand. If suppliers can increase output substantially with little or no increase in unit costs, supply is said to be quite elastic. Under these cricumstances, whatever is the nature of demand, the imposition of a tax will lead to larger reductions in output and larger increases in prices than if supply were less elastic. On the demand side, the more consumers respond to changes in price by changing the amount they buy -- or the more elastic the demand -- the smaller the proportion of the tax increase borne by them in higher prices and the greater the reduction in output. Conversely, the less elastic the demand, the more of any tax consumers will bear in higher prices and the less in reduced quantity purchased.

Unfortunately, the RRNA analyses of underlying supply and demand conditions are flawed. In addition, these analyses fail to support their estimates of supply and demand elasticities.

Our criticisms of the RRNA analysis, and the importance of these criticisms for the projections of the amount of the tax borne by consumers, can be easily summarized.

1. RRNA claim that the producers and distributors of VCRs and videocassettes "enjoy substantial profit margins" that give the industry the "capacity to absorb increased costs attributable to a royalty fee." These claims are contradicted by RRNA's own analysis that show there is now "strong price competition" and that "competition in both VCR equipment and tape markets will become keener over time".

2. RRNA assume a value for the supply elasticty of VCRs and videocassettes that is both less elastic than would be implied by

their own description of the industries, and less elastic than would be implied by conventional economic analysis. RRNA's own report explains how their analysis would have been changed if they had assumed supply is more elastic: "The more elastic supply is, the greater the proportion of increased costs which are reflected in consumer prices."

3. RRNA claims the demand for VCRs and videocassettes both are very elastic. To support this position they describe competition between brands of VCRs and videocassettes, which is irrelevant to the issue of who would pay a tax imposed on all brands of these products. They also overstate the substitutability of videodisc players for VCRs. RRNA also fail to explain why they choose exceptionally high estimates of the value of demand elasticity in preference to lower, more conventional estimates. Again, RRNA's own report explains the difference made by choosing a smaller value for demand elasticity: "The more inelastic demand, the greater the proportion of increased costs that would be passed through to consumers by increased prices."

In every case, the effect is the same. The RRNA analysis and projections dramatically understate the proportion of the tax that consumers would pay, and overstate the proportion that would be borne by manufacturers.

SUPPLY CONDITIONS

Competition in the VCR and Videocassette Tape Industries

The RRNA report states that both the VCR and videotape industries are "fiercely competitive". It bases this statement on its analysis of both the structure and pricing practices of the two industries. We do not question RRNA's conclusion that these industries are competitive. What we challenge is RRNA's attempt to combine this conclusion with a second, inherently contradictory conclusion -- that the VCR and videocassette industries, although competitive, have a large profit margin that would allow them to cover the royalty tax.

Firms in a competitive industries do not persistently earn large profit margins. In a highly competitive industry prices ultimately must correspond closely to production costs, including a reasonable return on capital. If costs fall, due to a technological advance or a fall in the price of raw materials, then the price of the good will be driven down by competition among the firms, each attempting to gain a larger market share by reducing prices to costs. Conversely, if costs (including a reasonable return on capital) increase, then the price of the good will increase. Intense competition among the firms implies that they are already pricing at cost and have no leeway to absorb higher costs. A fee or tax imposed on a competitive industry has the same effect -- the firms have no leeway to absorb those additional costs and they must be passed on to consumers in the form of higher prices.

RRNA fail to provide any convincing evidence that the firms in the industry earn excess profits (nor could they without negating their conclusion that the industries are competitive). The return on sales and on equity reported by RRNA are for the entire operations of firms manufacturing VCRs and cannot be used to assess the profitability of VCR manufacturing.[1] The positive return on sales figures do not indicate, as RRNA suggest, a profit margin that could be drawn down by a royalty fee. A reduction in the profit margins necessary to provide an adequate return on capital would ultimately cause these firms to cease producing VCRs.

This is true even if on non-VCR business these firms are earning more than an adequate return on capital. After, all, those firms always have the choice of taking their capital out of VCR production and investing it in stocks or bonds and to avoid the tax. Thus, if production of VCRs leads to less than an adequate return on the capital used to make VCRs, firms will use their resources to make other goods rather than "subsidize" VCR production.

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[1] The difficulties of detecting the presence or absence of excess profits from even the best data on returns on equity or sales are well recognized in the economics literature. See, F. M. Scherer, Industrial Market Structure and Economic Performance, 2nd edition (Chicago: Rand McNally, 1980), Chapter 9.

Furthermore, the claim that "it is likely that returns on VCRs equal or exceed figures shown (for return on the activities of the firms), since manufacturers were drawn into the relatively new VCR market in anticipation of higher, not lower, profits" compounds the earlier error. That description greatly oversimplifies how firms decide to enter a new market, and ignores the losses that firms often incur in entering new lines of business.

RRNA have attempted to bolster its argument that a tax could be absorbed by the industry by claiming that wide differences found in retail prices imply that "those with any price except the lowest [retail price] are enjoying a profit margin", which could be drawn down to cover the royalty tax. What RRNA fail to account for is that different retail stores offer different services such as credit, repair, convenience, and information about the product. This is a widespread phenomena in the U.S. economy, and is reflected in persistent retail price differences for a wide range of very competitively supplied goods. That these services are reflected in the prices charged in the various establishments is neither evidence of a profit margin that somehow survives competitive pressure in the retail sector nor of wholesale prices that include a noncompetitive profit margin.

RRNA's misunderstanding of the functioning of the distribution process in the U.S. economy is also evident in another statement: "pricing decisions of VCRs are made at a variety of points throughout the distribution channel, with the possibility for industry's absorbing at least some of the cost increase at each one". The number of steps in the distribution process, however, is totally irrelevent to the issue at hand. As long as the firms at each distribution stage are competitive, the prices they charge simply reflect their costs of doing business. Any disparity in the level of prices charged by firms that are engaged in similar activities would reflect the different services that they provide. RRNA's failure to present any evidence that noncompetitive conditions exist at any distribution stage is indicative of their misunderstanding of the implications of the argument they are trying to make.

The Assumed Supply Elasticity is Contradicted by Evidence Presented in the Report

To project the proportion of a tax that would be paid by consumers, RRNA must have a value for the supply elasticity of VCRs and videocassettes. Since RRNA did not find any useful estimates of supply elasticity in their search of the literature, they assume a supply elasticity value of one; this implies that if price were to increase by ten percent, the amount offered for sale would also increase by ten percent. The problem with the value they pick is that it is inconsistent with the evidence on supply conditions that RRNA presents throughout the report. This evidence suggests that the industries can be expected to expand output with little or no increase in price at all.

In fact, this latter description is far more common for a competitive industry. Most analyses of competitive industries find that they can expand capacity to meet increased demand with little or no increase in price. Exceptions occur only when the industry faces a supply bottleneck that cannot be overcome. RRNA's description of the video industries makes clear that there is no evidence of such bottlenecks restraining the supply of VCRs or videocassettes. This implies a much more elastic supply than the value assumed by RRNA, and also means that more of the tax will be passed on to consumers than RRNA project.[2]

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[2] This does not mean that the industry will adjust to the royalty tax instantaneously. Initially the tax would lead to a reduction in the rate of growth of the industries (and in the extreme a fall in the output of the industry). To the extent the industry had planned a higher of level of output than could be sold with the tax, then it will bear a portion of the tax until it adjusts to the new level of demand in the market. That adjustment, however, is a costly process, since it means that resources used in production of VCRs or videotapes will not be used efficiently. That adjustment must occur at all levels of production and distribution, and may imply that marginal operations, such as retail outlets which were established in anticipation of growth, will go out of business.

DEMAND CONDITIONS

FACTORS CAPABLE OF AFFECTING THE DEMAND ELASTICITY FOR VCRS AND VIDEOCASSETTES

A central fault of the RRNA analysis lies in their use of the state of competition in the industry, a factor that offers evidence on supply conditions, to prove that the demand for VCRs and videotapes is highly elastic (responsive to price), and therefore that a tax on these items would mostly be borne by the industry. The only set of demands for which this analysis is valid, however, is with respect to the demand for specific brands of VCRs and videotapes. In other words, the demand for a Panasonic VCR is highly reponsive to a change in the price of Panasonic VCRs, if the prices of other brands of VCRs remain unchanged. But all that implies is that virtually none of a tax imposed solely on Panasonic VCRs would be passed on to consumers. That is not surprising. A tax imposed on a single brand of most any good could not be passed on to consumers and would be likely to drive the manufacturer of that brand out of business. A correct analysis of the response of consumers to a tax on all brands of VCRs and videotapes should only consider factors affecting the demand for the generic products. The RRNA examination of interbrand competition has no bearing at all on the elasticity of demand for the two products that may be taxed.

RRNA also support their claim that the demand for VCRs is very elastic by arguing that videodisc players are a close substitute for VCRs and will therefore constrain the ability of the industry to pass on a tax to consumers. Their discussion, however, fails to recognize that videodisc players are unable to provide many services which are highly valued by VCR owners, such as videotaping of birthday parties, or product information sent by manufacturers to retailers on videotape. Videodiscs also cannot be used to store information or programming sent in the early morning hours and intended for later replay. Thus it is very doubtful whether videodisc players really are such good substitutes for VCRs that they will make the demand for VCRs very elastic. The low degree of substitutability between the two media is also evident from the limited effect of sharp cuts in videodisc prices in recent months on the VCR market. If these two products were such good substitutes as RRNA claim, then these price cuts should have had a pronounced impact on VCR sales -- yet no such impact has occured.

Demand Elasticity Used in the RRNA Report

To project the proportion of a tax that would be paid by consumers, RRNA must have a value for demand elasticity as well as for supply elasticity. RRNA assume that demand elasticity for VCRs and videotapes is presently 3, and will increase to 4 by 1984 and to 8 by 1990. These values are drawn from several sources including: their "own analysis" that provides the initial value of 3; a study by Bass that provides the assumed value of 8 for 1990; and a study by Tsurumi and Tsurumi that argues that the demand for color television sets became more elastic once the market reached the "saturation point".

The demand elasticity values used by RRNA, especially for 1990, are extraordinarily high by the standard of the demand elasticities found in economics literature for other consumer durables.[3] Such high values -- and calculations based on them -- should only be accepted in place of more conventional estimates if a clear case has been made for preferring these estimates. RRNA fail to make such a case.

The only support RRNA provides for assuming that demand elasticity now equals 3 is that it is "revealed" by "our own analysis." That analysis, however, is not presented and therefore cannot be evaluated. To support the increase in demand elasticity from 3 to 4 to 8 between 1982 and 1990, RRNA cites a study of color televisions by Tsurumi and Tsurumi. They fail to mention that the same study also provides estimates of the demand elasticity of color televisions. Those estimates, however, are much lower than the estimates used by RRNA. Tsurumi and Tsurumi estimate demand elasticities that range from 0.29 to, at their highest, 1.29. These elasticities are lower than any used by RRNA. In particular, they are much lower than the elasticity of 8 for 1990 that RRNA draws from the Bass study. RRNA, however, give no reason for preferring the Bass number, even though the Bass study is the more unconventional and controversial in both its results and methods, and even though they rely on other parts of the Tsurumi and Tsurumi analysis.

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[3] Demand elasticities commonly found in the economics literature range from about 0.3 for potatoes and sugar to 2.1 for automobiles and 3.0 for millinery. These representative numbers are presented in an elementary economics text by Richard G. Lipsey and Peter O. Steiner, Economics, Fifth Edition, 1978, p. 13.

By choosing such large values for demand elasticity, RRNA is claiming that consumers are extraordinarily sensitive to changes in the prices of VCRs and videocassettes. An elasticity of 8, which RRNA have assumed for 1990, implies that a fifteen percent fall in the price of VCRs would more than double total number of VCRs people would buy. In contrast, if demand elasticity is one, approximately the value found by Tsurumi and Tsurumi, the same fall in price would cause consumers to increase purchases by one-eighth as much as RRNA projects.

May 11, 1982

MEMORANDUM

TO: Charles Ferris
Home Recording Rights Coalition

FROM: Nina W. Cornell and Steven R. Brenner
Cornell, Pelcovits & Brenner
Economists Inc.

SUBJECT: Comments on the Statement of Jay Eliasberg Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice
House Judiciary Committee, April 12, 1982

Mr. Eliasberg argues that home videorecording will cause a decline in the size of reported audiences for television programs, and thus a decline in the amounts paid to producers of television programs. He bases his argument on two premises:

1. The total amount of time people spend watching television will be unaffected by VCR use.
2. The audiences for these home recordings will be understated.

Consequently, concludes Mr. Eliasberg, "Programs which would have been viewed and would have had their audiences correctly reported will be replaced by playbacks of recorded programs. And ... the vast majority of those recorded programs will have their audiences understated." (pp. 5-6)

Unfortunately, neither of the premises of Mr. Eliasberg's argument withstands close scrutiny, and his conclusion that VCR use will reduce reported program audiences falls with his premises.

Mr. Eliasberg asserts that "neither VCRs nor anything else in the foreseeable future will have any substantial positive effect on the use of television by the average television family." (p. 3) He cites no direct evidence that supports this assertion. Instead, he points out that A.C. Nielsen data for 1981 show that the average television household had a television set in use for six hours and 43 minutes per day. From this, Mr. Eliasberg claims, "it is clear that the use of such recorders is not going to increase television set usage to any appreciable degree." (p. 3) This indirect argument -- the only argument he makes on this point -- is hardly conclusive.

-- First, 6 $^3/_4$ hours is an average. VCR owners are disproportionately from demographic groups that watch below-average amounts of television -- even if they do not own a VCR. Therefore VCR households could increase their total television viewing before their average viewing reached 6$^3/_4$ hours per day.

-- Second, and perhaps most telling, 6$^3/_4$ hours per day is how long the television set is on in the average household; it is not how long per day any individual in the household watches television. Television sets in a household of four could be on for 6 $^3/_4$ hours a day even if no one in the household watched more than two hours a day. It certainly is not obvious that there are too few available hours in the day for individuals to watch more than two hours of television a day.

Mr. Eliasberg fails to support his assertion that VCR use will not increase total television viewing, contrary to the suggestion of several surveys.[1] This is not surprising since his claim contradicts common sense. Many surveys show that the primary use of VCRs is to allow viewers to watch programs they otherwise would miss. Common sense suggests that most viewers, given more programs from which to choose, will find more programs they consider worth watching and, therefore, will watch more television.

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[1] It would take a careful study to measure accurately the effect of home videorecording on total television viewing, and such studies have not been done. Simple comparisons of the total viewing of VCR and non-VCR households would be unsatisfactory because VCR and non-VCR households differ in many other ways that influence viewing; for example, they differ in income level and in the age and marital status of household members. Several surveys have asked VCR owners whether they watch more or less television since buying their VCRs, and the responses suggest some increase. This is not definitive, however. VCRs allow viewers to watch prerecorded material as well as to record and playback broadcasts. A household with a VCR might watch the same number or fewer programs after they got the VCR because they now watch prerecorded tapes, yet also be watching more television programs than if they were unable to make home recordings but could watch prerecorded materials -- as would be the case if they had a videodisc player.

Mr. Eliasberg's second premise is that audiences for VCR tapes are much underreported. He looks first at the use of meters to measure national audiences for network programs. He claims meters understate VCR viewing because they only measure VCR recording, not playback. This means, says Mr. Eliasberg, that meters understate tape audiences whenever a recording either is viewed more than once, or is viewed after the program was also watched when taped.

There are two reasons a tape might be watched more than once, or watched when the broadcast itself also was watched. The tape playback could be for household members who missed the first playback or the broadcast; in those cases the playback increases the number of household members who see the program once. Alternatively, the additional playback could be to allow some members of the household to rewatch a program.

If the additional playback was to allow more family members to see the program, meters cannot be said to understate the audience for a very simple reason: meters never measure the number of people in an audience. Meters measure only the number of households whose television sets are tuned to a program or that record a program. Meters register one household in the audience when the television set is on whether one or ten or zero people are watching; meters register one household in the audience when a program is taped whether the tape is watched by one person at one playback, ten people at one playback, or ten people at ten playbacks.

In other words, meters measure VCR use in a way quite comparable to the way they measure direct broadcast viewing. In asking for playback adjustments Mr. Eliasberg is asking that meters measure audiences for home recordings on VCRs more completely than they measure the audiences for broadcasts.

Mr. Eliasberg next turns to diary measurements of local audiences. He observes that diaries do not have special instructions for VCR owners, and thus "any entries made by VCR owners regarding recording or playback are strictly 'voluntary' and cannot be relied upon." (p. 7) He is correct that entries are voluntary. That fact is, however, that both Nielsen and Arbitron do rely on these entries in order to include a tape audience for programs in the total reported audience. Mr. Eliasberg is wrong when he says, "no rating service based on diaries now provides any measurements of the viewing of recordings in their audience ratings data." (p. 8)

Finally, Mr. Eliasberg claims that diaries cannot be devised that would request and collect more complete information on VCR recording and playback. He underestimates the ingenuity of Nielsen and Arbitron. Both have designed and tested special diaries to collect such information. At least one of the services has field tested such a diary, considers it ready for use, and intends to use it as soon as more viewers have VCRs and the question of copyright infringement is settled.

Despite Mr. Eliasberg's claims to the contrary,

1. The ability to make home recordings is far more likely to increase the amount of television watched than to leave it unchanged; and
2. The ratings services already measure the audiences for home videorecordings, and will measure these audiences with increasing accuracy as time passes.

Not only will VCRs not decrease the reported audiences for television programs, in all probability VCRs will increase the reported audiences for television programs.

Senator **Dole**. Mr. Chairman, could I just ask—I have got to leave—will we be able to submit questions in writing to any of the witnesses?

Senator **Mathias**. Yes; we are going to keep the record open for 3 weeks, so that there will be an opportunity for both the witnesses to submit their further reflections after their appearances here, as well as the committee members to address questions.

Ms. Cornell.

Ms. **Cornell**. Thank you, Mr. Chairman.

I am Nina W. Cornell, president of Cornell, Pelcovits & Brenner Economists, Inc.

I thank you for this opportunity to present to you my views on the economics of home videotaping. The various bills before you offer three proposed changes to the copyright laws. On one, all concerned about this issue are in accord. Americans, in the privacy of their homes, should be free to make videotape recordings for personal use of programing transmitted into their homes by television or cable television.

The second change would have the Copyright Royalty Tribunal impose a tax on the sales of all video cassette recorders and video cassettes. The proceeds of the tax would be used to pay copyright holders in some unspecified manner.

The third proposed change to the copyright laws would abolish the longstanding doctrine of first sale—the principle upon which the very existence of public and school libraries depends.

These last two proposals do not meet the test of good public policy—if it ain't broke, don't fix it.

In the interest of time, I will only briefly discuss here how the market is already paying compensation and the problems with the tax itself. The remainder of my conclusions are found in my written statement.

The vast majority of home video recording is done for the purpose of time shifting—to watch a program at a time other than when it is transmitted. Each taping is currently counted by the ratings services as equivalent to a single, real-time viewing of the program, and the two categories are not broken out in the ratings sent to the ratings services' clients. Thus, the advertisers' payments to broadcasters and broadcasters' payment to program suppliers are based on audience measurements that include and count both real-time and taped viewing identically.

Moreover, the trends in these markets point to a continuation of such compensation in the future, despite the Frito-Lay letter. At least one of the ratings services has invested the amount necessary to field test a new VCR diary that they plan to start using when, VCR penetration reaches a high enough level and when, or if, home recording is no longer considered an infringement of copyright.

The proponents of a royalty tax have argued that advertisers will not pay for viewers of videotapes, citing recent survey data showing that around 87 percent of video cassette recorder owners have ever deleted a commercial while recording a program. The relevance of this is doubtful, since first, the same survey showed that only 23 percent of all home recordings were made when viewers could delete commercials—which is while recording—and second, virtually all viewers would have to answer yes if asked whether they ever skipped a commercial while watching a television broadcast.

Before advertisers decided that tape viewers were no longer of value to them, the relevant question should be how the commercial deletion activities of tape viewers compare with those of real-time viewers. There is no data on that subject.

Market trends also point to a diminution or elimination of any taping that today may not be fully compensated for in the market, for tapes that first, were made from advertiser supported programs rather than pay services, and second, not only were made and libraried, but also were viewed so frequently that they substitute for viewing a rebroadcast or other showing of the same program. There is no evidence of any such substitution.

Viewers are unlikely to build large libraries of videotapes of movies for permanent retention from advertiser supported program services. Even if the commercials are deleted, movies will have been edited to comply with taste and time constraints. As a result, they will be an inferior product compared with the same movie title from any other source.

Home video recordings made from viewer-supported services do not leave the program suppliers uncompensated. The addition of the ability to record such programs makes the service more valuable to subscribers, and that increase in value can be tapped and used to compensate the program suppliers.

In summary, therefore, the proposal to impose a copyright royalty tax to insure compensation for copyright holders is largely unnecessary now, and will become even less appropriate in the future. Under these circumstances, to quote Mr. Valenti, a compulsory license is an abomination to the free market concept.

A closer examination of the tax proposal reveals several major flaws. No tax on VCR's and video cassettes can be designed to remedy any actual loss of compensation. The ultimate result, therefore, of such a tax would be to create windfall gains to some program suppliers, not as a reward for what viewers perceive as better creative effort, but as a reward for what a government agency perceives as more creative legal talent. This outcome would not serve the underlying goal of the copyright laws to stimulate more creative effort by rewarding what consumers believe to be successful creations. Over time, such a tax will distort the direction and pace of technological development, First, by slowing the consumer penetration of hard-copy video technology, such a tax will slow the growth of the made-for-hard-copy program supply market. The analogy to cable is instructive: by imposing barriers to the use of what was initially the most popular programing available for cable systems; namely, retransmitted broadcast signals—cable penetration was slowed down, which in turn slowed the made-for-cable program supply market.

Second, the tax would cause the developing prerecorded market to favor disc over tape.

Third, the tax would delay the time when video recorders can be used to effectively expand the television spectrum. If enough viewers had video recorders, programing intended for taping could be transmitted during the dead of night.

Fourth, taxing VCR's and videotapes would increase costs for a number of businesses who use tapes, and cannot similarly use discs, as part of their operations in ways that have no bearing on the copyright issues that are being discussed.

Finally, the tax would impose an unnecessary additional cost on those who wish to take up the hobby of making their home movies on video tape rather than 8 millimeter film. There is no social gain to be had from taxing either the business use of tape technology nor home movies to raise revenues for movie producers.

Thank you.

Senator MATHIAS. Thank you, Ms. Cornell. In view of the role of this committee as the protector of intellectual property rights, I should point out that the doctrine that, "If it ain't broke, don't fix it", is not yet public property; it is the intellectual property of Mark Twain's heirs.

Ms. CORNELL. I will be glad to pay a small fee.

Senator MATHIAS. If it were adopted as public policy, I think the Congress could have shorter sessions, and the President could spend more time on horseback.

[Prepared statement of Nina W. Cornell follows:]

STATEMENT OF NINA W. CORNELL, PRESIDENT
CORNELL, PELCOVITS AND BRENNER
ECONOMISTS INC.
Before the Senate Judiciary Committee
On
Copyright Aspects of Home Videotaping

April 21, 1982

I. INTRODUCTION

Mr. Chairman and Members of the Committee. I wish to express my appreciation for this opportunity to present to you my views on the economics of home videotaping. I have been retained by Sony to research these issues.

I am an economist in private practice in Washington, D.C., specializing in microeconomic analysis of regulatory, natural resource, and anti-trust issues. I am a graduate of Swarthmore College and received my Ph.D. in Economics from the University of Illinois in 1972.

Before entering private practice, my most recent position was Chief of the Office Plans and Policy, Federal Communications Commission, where I managed an interdisciplinary staff of 35 people. As Chief of the Office of Plans and Policy, I also served as chief economist to the Commission. Prior to being associated with the FCC, I was the Senior Staff Economist for regulatory, transportation, environmental, and health and safety issues for the Council of Economic Advisors. Prior to being with the Council, I was employed as an Economist with the Council of Wage and Price Stability, where I served on the Task Force on Reform of Federal Energy Administration Regulations.

Before joining the Federal Government, I spent 4 years at the Brookings Institute as a Research Associate. I have published a number of articles and papers and have co-authored a book.

The various bills before you offer three proposed changes to the copyright laws. On one all concerned about this issue are in accord: Americans, in the privacy of their homes, should be free to make videotape recordings for personal use of programming transmitted into their homes by television or cable television without fear of penalties for copyright infringement. One of the proposals, however, suggests that two further changes are needed. The first change would have the Copyright Royalty Tribunal impose a tax on the sales of all video cassette recorders and video cassettes.[1] The proceeds of the tax would be used to pay copyright holders in some unspecified manner. The second proposed change to the copyright laws would abolish the long-standing doctrine of first sale -- the principle upon which the very existence of public and school libraries depends.

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[1] Some have questioned the accuracy of calling the proposed copyright royalty tax a tax. Alan Greenspan noted when questioned about this usage of the term tax, that a tax is "an imposition on one's country to obtain revenues for public purposes," and a tax is paid to "a governmental body." This levy fits that definition exactly, as it does the definition in Webster's Third New International Dictionary (unabridged), "a pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes..." The proposal would have the national legislature, Congress, levy a pecuniary charge on property, output of blank videotapes and video cassette recorders, to be paid a governmental body, the Copyright Royalty Tribunal, to support a public purpose, payments to coyright holders.

These last two proposals -- the tax and the abolition of the first sale doctrine for video materials -- do not meet the test of good public policy -- if it ain't broke, don't fix it.

II. THE PROBLEMS WITH THE COPYRIGHT ROYALTY TAX

I believe that the first issue before you -- whether there should be a tax imposed on video cassette recorders (VCRs) and video cassettes -- has arisen because people have not fully understood how the programming that is supplied for the various video distribution services is paid for. When those market transactions, in combination with the facts about VCR usage, are examined more closely, it becomes clear that the vast majority of home videotaping from television and cable television is being fully paid for now. Under these circumstances, to quote Mr. Valenti, "A compulsory license is an abomination to the free market concept."[2]

[2] Statement of Jack Valenti, President of the Motion Picture Association of America, on Cable Retransmission of Copyrighted Programming, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the Committee on the Judiciary, November 26, 1979.

A. How the Market Already Compensates Copyright Holders

The vast majority of home video recording is done for the purpose of time-shifting -- to watch a program at a time other than when it is transmitted.[3] Such tapes are made when the viewer is not home or otherwise cannot watch television, or when he is watching some other program but does not want to miss viewing the programming of another channel. Material taped for the purpose of time-shifting is later erased so the tape can be reused.

Whether or not broadcasters pay program suppliers for time-shift viewing depends on how this viewing is reflected in audience data collected by the ratings services. The program producers' compensation is closely linked to these audience ratings because the actual value of the program to the advertisers (who are ultimately paying for the broadcast) depends on how many people are watching the show and thus potentially being exposed to their advertisements. As a result, if taping raises the rating of a program, the compensation for that programming will rise.

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[3] While no one statistic from any single survey is beyond reproach or conclusive in itself, the same pattern -- more recording for time-shifting than for librarying -- reappears consistently in many surveys. In 1978 the Arbitron Company asked a group of VCR owners what they planned to do with each of the three programs they had most recently recorded: 66.2 percent said erase the program while only 18.1 percent said keep the program (and another 15.7 percent gave no answer). A 1978 "Survey of Betamax Owners", prepared by Crossley Surveys, Inc., asked respondents whether the last program they taped was recorded over a previous recording they had made: 87.6 percent said it was and in 66.4 percent of those cases they said the program had been watched only once before it was erased. A survey by Field Research Corporation, also in 1978, found that 75.4 percent of videorecorder owners used their machines for time-shifting half or more of the the time and 38.8 percent said they used their videorecorders "almost always to shift viewing time." In 1981 MART Magazine asked 2,000 owners of videorecorders, "What is your primary use of the VCR?" Only 10.2 percent said building a library of recorded programs, while 56.7 percent said recording while away from home or asleep or while watching another program, and 20.3 percent said playing prerecorded tapes.

Each taping is currently counted by the rating services as equivalent to a single real-time viewing of the program.[4] A program's rating is now based on the sum of real-time and time-shift viewing, and the two categories are not broken out in the ratings sent to the rating services' clients. Thus, the advertisers' payments to broadcasters are based on audience measurements that include and count both real-time and taped viewing identically.

The amount broadcasters pay program suppliers is closely linked to ratings: to expected ratings for one-of-a-kind programming (like movies) and new series; to actual ratings experience for continuing series. As a result, when taping does or can be expected to raise the ratings of a program, the compensation paid for that programming will rise.

Moreover, the trends in these markets point to a continuation of such compensation in the future, contrary to the claims of the proponents of a tax. At least one of the rating services has invested the amount necessary to field test a new diary designed to better count the viewing and taping of those who own VCRs. They plan to start using that new diary when VCR penetration reaches a high enough level to make such use cost-effective and when, or if, home recording is no longer considered an infringement of copyrights.

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[4] The rating services use two methods for determining audiences: meters and diaries. Meters are attached to the tuners of the television sets in each household used as part of the sample. The meters are connected to each television set and to each VCR tuner, so each time either a television set or a VCR is turned on it is counted without knowing whether anyone is in fact in front of either. With diaries, viewers are asked to record all uses of their television sets. Again, the tape viewing and the real-time viewing are counted in the same way.

The proponents of a tax have argued that advertisers will not pay for viewers of videotapes because videotape viewers delete the commercials. In support of this view they point to the existence of fast-forward scan and pause controls on the machines, and to survey data purporting to show high commercial deletion rates by video recorder owners.

Unfortunately for their position, not only does the actual working of the market, as noted above, run counter to these claims, so does both the technology of the machines themselves and correct interpretation of the survey data. Closer knowledge of how video cassette recorders could be used to delete commercials shows that use of either the pause button or the fast-forward scan control results in exposure to the advertisement. To operate the pause button to delete an advertisement requires close attention to the material being aired to know when to start and when to stop. This results in one attentive viewing of the commercial. To use the fast-forward scan control to skip an advertisement means that the viewer sees the entire advertisement, but at a faster pace and without the sound. The viewer is still exposed to the material, and must watch closely in order to know when to return to normal speed to see the programming. Such close concentration means that the taper cannot leave the room or engage in other activities while scanning, unlike real-time viewers. Thus, there is not a complete absence of exposure.

More importantly, before advertisers decided that tape viewers were not of value to them the relevant question would be how the commercial deletion activities of tape viewers *compare* with those of real-time viewers.[5] The information most cited on commercial deletion by tape viewers does not answer this question. For example, proponents of a tax have cited recent survey data showing that around 87 percent of video cassette recorder owners have *ever* deleted a commercial while recording a program.[6] The relevance of this is doubtful since first, the same survey showed that only 23 percent of all home recordings were made while the viewer was also watching the show, the only way most viewers could delete the commercials while recording;

[5] There does not appear to be any good information about how often real-time program viewers actually watch commercials. There are firms, that collect information about how well viewers *recall* advertisements aired the previous day. In the process of gathering that information, they try to narrow down the audience to those who were more likely to have been present for the commercial. Their methodology, however, is much too imprecise t make the suggested commercial message audience a usable measure of commercial skipping. Indeed, neither those firms nor the advertisers consider the data sufficiently accurate to use it fo setting the price they will pay for advertisements. Rather, the information is used to determine the relative effectiveness of the specific advertisement.

[6] *3d Annual Diary Study of VCR Homes*, Fall 1981, Media Statistics, Inc., Silver Spring, Maryland

and second, virtually all viewers would have to answer "yes" if asked whether they ever skipped a commercial while watching a television broadcast.

Thus, both the survey data, cited correctly, and the technology of video cassette recorders indicate that the market decision to count tape viewers the same as real-time viewers is both rational and appropriate. And, if tape viewers are counted as though they were real-time viewers, the program suppliers, in turn, are receiving compensation.

Market trends also point to a diminution or elimination of any taping that today may not be fully compensated for in the market. To the extent that compensation may be incomplete, it would be for tapes that first, were made from advertiser supported programs rather than pay services, and second, not only were made and libraried, but also were viewed so frequently that they substitute for viewing a rebroadcast or other showing of the same program. There is no evidence of any such substitution.

The movie producers have expressed fears that VCR owners are building up large libraries of movies taped off air. Both the available data on tape ownership and on viewer responses about program preferences do suggest that, to the extent that such tapes are made, they are more likely to be made of movies rather than of series programming. Viewers are unlikely, however, to build large libraries of videotapes of movies for permanent retention from advertiser supported program services. Such videotapes suffer from a serious quality difference when compared with tapes made from viewer supported services or with rented or purchased prerecorded cassettes. Even if the commercials are deleted, movies will have been edited to comply with taste and time constraints. As a result, they will be an inferior product compared with the same movie title from any other source.[7]

As both viewer supported program services and prerecorded cassettes become more widely available, viewers who want to watch videotape copies of movies in their own homes will be likely either to make such tapes from a subscription service such as Home Box Office or to rent a cassette for a few days. (It may be that as subscription services become more widely available viewers will have less desire to make copies for long-term retention because services like Home Box Office offer multiple showings of the titles over a month or more. The major reason for taping movies at home may then be for time-shifting -- no matter how frequently a movie is played the timing still may not fit in with the viewer's own schedule.) Not only will the quality be better than if the cassette is taped from an advertiser supported program service, but the movie will be available sooner after theatrical release.

Home video recordings made from viewer supported services do not leave the program suppliers uncompensated. The addition of the ability to record such programs makes the service more valuable to subscribers, and that increase in value can be tapped and used to compensate the program suppliers. Moreover, where such services are available, it is likely that the ability to make recordings will increase the number of subscribers over the number who would have been subscribers in the absence of the ability to tape. Thus, program suppliers gain in one or both of two ways: additional subscribers and higher subscription prices; the result will be higher revenues.

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[7] See, for example, "Cable TV, Home Video and Chopping of Movies," by Janet Maslin, New York Times, Thursday, March 25, 1982.

In summary, therefore, the proposal to impose a copyright royalty tax to ensure compensation for copyright holders is largely unnecessary now, and will become even less appropriate in the future. Thus the proposal fails one of the first tests of good public policy: if it ain't broke, don't fix it.

B. A Copyright Royalty Tax is not only Unnecessary but Costly

The conclusion that the copyright royalty tax proposal fails the test of good public policy is strengthened by a closer examination of the tax proposal, which reveals two additional, possibly fatal, flaws. First, and most importantly, no matter how well intentioned, no tax on VCRs and video cassettes can be designed to remedy any actual loss of compensation. The movie producers allege that they are damaged every time a viewer makes a home recording, no matter whether that recording is for time-shifting or for permanent retention and no matter from what kind of service the recording was made. As I outlined earlier, however, movie producers already receive compensation for all time-shifting and all recording from pay services. The only possible loss of compensation -- and one that has not been shown to exist -- that home recording could impose on them would occur if viewers built video cassette libraries of movies recorded from advertiser supported program services that substitute for viewing a later rebroadcast of the same movie. In that event, the compensation that program suppliers would not be receiving would be payment by advertisers for each time those video cassettes were viewed instead of watching that rebroadcast. If the viewer had seen the rebroadcast, the advertisers would have compensated for that viewing; if he watches his own recording instead, the advertisers might not be willing or able to collect the information necessary to increase the advertising payments.

Because of this same inability to collect the necessary information, however, no government agency could discover the substitution of libraried tapes for commercial rebroadcasts and pay the appropriate compensation -- namely the implicit price per expected viewer that the networks and independent stations would pay. Instead, that agency would have to develop some rules of thumb, based on data collected for other purposes, to distribute the proceeds of the tax. The ultimate result, therefore, of such a tax would be to create windfall gains to some program suppliers, not as a reward for what viewers perceive as better creative efforts but as a reward for what a government agency perceives as more creative legal talent. This outcome would not serve the underlying goal of the copyright laws: to stimulate more creative effort by rewarding what consumers believe to be successful creations.

Second, the tax will result in double compensation for those who do receive its collections. The proceeds of the tax are analogous to a subsidy for those who actually receive the monies collected. In a normal, competitive market, any monies received as a subsidy normally result in lower prices for buyers of the product. In this case, however, buyers -- namely advertisers and broadcasters -- will not face lower prices due to the subsidy for two reasons. First, the distribution of the proceeds would take place long after the market purchase is made, as the distribution presumably would have to relate in some fashion to either viewing or taping. Thus, the information on the level of subsidy to be received would not be available. Second, because the distribution of the monies collected will have only a tenuous relation to actual librarying behavior, let alone librarying that substitutes for viewing rebroadcasts, the forces of competition cannot work to increase the supply of product likely to be libraried, and thus lower prices. Thus, the tax would not substitute for any of the market compensation but merely be added to it. The consumer will ultimately bear the full cost of the tax in addition to bearing the full cost of the existing market transactions, as he does now.

As in all cases where the ultimate price is raised without either any increase in the value received by the consumer or any correction of a market failure, the consequences of the raised price are reduced consumer satisfaction and lower efficiency in the markets involved. This case would be no exception. The requirement that the consumer pay twice simply means a reduction in the total benefits that consumers derive from the particular technology and a reduction in the overall well-being of society.

In addition to the narrow effect described above, moreover, over time such a tax will impose additional, broader costs on society by distorting the direction and pace of technological development. Five such costs can be identified already, despite the relative newness of videotape technology.

First, by slowing the consumer penetration of hard copy video technology, such a tax will slow the growth of the made-for-hard-copy program supply market. The analogy to cable is instructive: by imposing barriers to the use of what was initially the most popular programming available for cable systems -- namely retransmitted broadcast signals -- cable penetration was slowed down, which in turn slowed the made-for-cable program supply market.

Second, the tax would cause the developing prerecorded market to favor disc over tape. Currently, despite its lower cost to consumers, disc technology is clearly a poor second in consumer acceptance to tape. Absent any compelling social losses incurred by allowing tape to retain the market edge, there is no reason to interfere with this market outcome.

Third, the tax would delay the time when video recorders can be used to effectively expand the television spectrum. Many television channels now go dark in the very early hours of the morning for a lack of audience. If enough viewers had video-recorders, programming intended for taping could be transmitted during these hours. Because there would be no need to be concerned about audience flow during this period, it would be an ideal time for stations to put on programming that served specialized tastes. Viewers would set their timers for the parts of the transmission they wanted to view and would not record the remainder. Such programming could include children's programming, cultural events, movies, and other programming that today have a harder time fitting into a schedule that, for economic reasons, must be dominated by attracting and holding the widest possible audience.

A tax on video recorders, by reducing the penetration of the machines, would slow the development of a potential audience for such a service. In addition, since a tax on tapes would increase the cost of taping programs and reduce the number of viewers who would use such a service, the tax on tapes would mean that a higher penetration of recorders would be necessary before there would be a large enough potential audience for a station to find it profitable to offer such a service. Delaying or, in smaller communities, preventing altogether such an improvement in the efficiency with which television spectrum is used imposes a significant social loss.

Fourth, taxing VCRs and videotapes would increase costs for a number of businesses who use tapes (and cannot similarly use discs) as part of their operations in ways that have no bearing on the copyright issues that are being discussed. Business uses of videotapes fall into two categories: uses that increase productivity in the production of other goods and services, and uses in which the videotape is itself the end product. Use of videotape for training and internal communication of new trends are examples of the first type of business use. Training with the aid of videotapes is used widely in hospitals, banks, and insurance and electronic sign construction companies. Automobile companies, among others, use video tapes to pass on important information to dealers. Additionally, new businesses have emerged that videotape weddings, wills, family histories, inventories of all kinds, and the like. The list is in fact much longer than may be realized. The imposition of a tax on these uses would lead to raised costs for these sectors without any compensating social gains.

Finally, the tax would impose an unnecessary additional cost on those who wish to take up the hobby of making their home movies on videotape rather than eight millimeter film. This is another area in which the market has demonstrated that videotape is a superior technology in the eyes of consumers.[8] There is no social gain to be had from taxing either the business use of tape technology nor home movies to raise revenues for movie producers.

C. The Copyright Royalty Tax Mechanism Would Mean a New, Unwieldy Regulatory Program

Today, all government programs, and particularly all government regulatory programs, are being reexamined thoroughly to eliminate all but those whose benefits to society outweigh their costs. In the process, those that remain are being reformulated to abolish old, general, unlimited mandates and to replace them with specific directions from Congress. The proposal for a copyright royalty tax would create a regulatory program that meets neither test. Not only would the tax be unnecessary and costly, the mechanisms for collecting and disbursing it would themselves require the establishment of a new, contentious, and costly regulatory program within an agency that has not been notably successful at running the programs already entrusted to its care.

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[8] See "Sales of Home-Movie Equipment Falling as Firms Abandon Market, Video Grows", Wall Street Journal, Wednesday, March 17, 1982.

The regulatory program would be contentious for two basic reasons. First, the proposed legislation does not offer any guidelines for establishing the level of the tax, nor for handling the uses of videotape that do not involve off-air taping of copyrighted material. Such guidance is absent for one simple, excellent reason: none can be devised that is clearly fair and workable. If such guidance could be easily developed, it would have been included as part of the proposal. Yet, an agency with little staff and a short and undistinguished existence is supposed to have the wisdom of Solomon when handed this issue that, with the best of resources, would be nearly unsolvable.

Second, the technology that would be taxed is changing. The videorecorder is a device that records material on a videotape cassette and plays material contained on a videotape cassette; it also today has built into it a television tuner. The market long has offered as separate components television tuners, display monitors, sound systems, and tape recorders.[9] This trend is likely to accelerate once the Federal Communications Commission allows stereo sound for television. Thus, in the very near future the CRT will have to determine on what to impose the tax: the video cassette deck that no longer has a tuner; the tuner, which will be as necessary for real-time viewing as for taping; or what? Some of these issues already are plaguing those few countries where a tax has been tried.

Where there is contention over issues facing a regulatory agency there are also significant costs, and the purported beneficiaries of the agency action are the losers. A large share of the proceeds of this tax would be spent in advance to pay the private costs of participating in the lengthy procedings before both the CRT and the courts arguing about the amount of the tax, the appropriate piece of equipment to tax, how to avoid taxing business and home uses that have nothing to do with copyrighted material, and how to distribute the proceeds of any ultimate collections.

None of these are issues that there is any reason to believe the CRT will handle quickly or well. First, to date the CRT has had responsibility for adjusting, collecting, and disbursing revenues from mandatory copyright fees imposed on cable television and jukeboxes. Despite having the initial level of those fees set by law, rather than being at the discretion of the CRT, to date it has been unable to conclude any of its rate-setting or royalty fee distribution proceedings for cable television or jukeboxes. These proceedings have been tied up in court challenges from those who believe they were not allotted an appropriate share of the proceeds. Such challenges offer relatively straightforward issues compared to the ones outlined above.

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[9] In 1981 sales of the portable VCR (with a detachable tuner) comprised 20 percent of total VCR sales. (Electronic Market Data Book, EIA, 1981.) MART (January, 1982, p. 29) predicted that portable sales should rise to 35 percent in 1982. It would be a simple step to offer the tuners as completely separate units that could be used either with a VCR or a television display monitor.

Second, those proceedings involve only about one tenth of the amount of revenues that might be collected if a tax of fifty dollars per machine and one dollar per videocassette were adopted. If the CRT cannot manage to collect and disburse in a timely manner the smaller sums, how can it be seen as competent to manage this much larger pool of monies?

One of the reasons advanced for the failings to date of the CRT is its relative absence of staff. To correct this, however, means creating from scratch the very kind of large, regulatory bureaucracy that both the Executive Branch and the Congress have been trying to curb and curtail, rather than construct.

In summary, therefore, the proposal to establish a copyright tax is a call to create a new, big regulatory program that foresight shows will not in fact be able to correct the problem that supposedly led to its establishment. It is the wrong response to a problem that, to the extent it exists now to any significant degree, will only get smaller over time, not bigger. To quote Mr. Valenti again:

> The sad truth is that the Copyright Royalty Tribunal can never take the place of marketplace action. No government

> tribunal, no matter how intelligently constituted can regulate supply and demand, nor fairly determine how much someone should pay for a television program. Who can make such a subjective decision except those who sell and those who buy in the marketplace?[10]

III. ABOLITION OF THE FIRST SALE DOCTRINE WOULD BE BAD PUBLIC POLICY

Proponents of the copyright royalty tax also want to abolish the ability of those who buy prerecorded video cassettes and discs to dispose of those tapes and discs in whatever manner they choose without prior approval from the copyright holder. In other words, they wish to abolish the doctrine of first sale. If the first sale doctrine had not applied to books, libraries would either have been impossible or very costly to build and use. Abolition of the first sale doctrine for video is being advocated precisely because of the widespread popularity of rental video cassette libraries, many of which are being created and maintained by new, small business ventures across the country. Today, those who do not,mind the technical inferiority and smaller size of the picture available from video cassettes can join together, go to one of these libraries, and rent a cassette for about the price of one seat at the theater.

Movie producers apparently did not anticipate this market phenomenon when they first began exploiting the prerecorded video cassette market. Now they want more of the revenues that the rental market has generated and want to make it more expensive to rent a video cassette, at least of a new title. Some movie producers today are moving to do just that by not releasing their newest pictures for sale but only for rental. Warner, for example, has begun a program of only renting its major titles on video cassettes on a sliding scale fee: higher for the first six months, lower for the next six months, and so on. After a period they will be willing to sell the videotapes, but presumably not until all those who have a high desire to see the movie while still new and talked about have been forced to see it at prices closer to those for theatrical release than had been the case before.

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[10] Statement of Jack Valenti, President of the Motion Picture Association of America, before the Senate Subcommittee of Communications of the Committee on Commerce, Science and Transportation, June 6, 1979.

To follow this strategy, however, denies the movie producers that part of the market -- however small -- that is comprised of people who would like to own a video tape of the movie purely for their own private enjoyment -- they would not rent or loan that cassette to others -- but only if they can buy the cassette at about the same time as the theatrical release of the movie. Many private buyers of video prerecorded cassettes may fall into this category because of the stimulation of sales caused by the promotion of the theatrical availability of a movie. To wait until later to allow private purchases may mean that the movie has become victim of the old adage: out of sight, out of mind.

If the first sale doctrine were abolished, however, movie producers could both sell and rent without losing high intensity viewers to rented cassettes at prices below theater ticket prices. One kind of tape could be sold or rented to dealers, who could in turn rent it out by paying a share of the rental fee to the producer. A second kind of tape could be sold to private purchasers at a lower price with the movie producers knowing that widespread rentals to others by the original purchaser would be illegal.

In other words, abolition of the first sale doctrine would restore some of the movie producers' ability to divide the market for their movies and charge different prices to those who have strong but short-lived desires to see a particular movie, while charging lower prices for those who do not mind waiting to see the product. Such a market division used to be reflected in the ticket prices for downtown, first-run movie theaters as compared with the prices in suburban theaters where older films were shown. Movie producers want their ability to engage in such price discrimination restored.

A decision to abolish the first sale doctrine for video materials would have several consequences. First, it will raise the rental price to consumers by a significant amount. Today, the video cassette rental business is a fiercely competitive, growing and healthy small business enclave. These dealers are following in the footsteps of those who first made books available to large numbers of people, the early lending libraries. Because there are no barriers to entry, that competition has kept prices to renters as low as possible. With the abolition of the first sale doctrine, rental prices would rise for two reasons. First, given that today prices just cover costs, any increase in the payments to copyright holders -- the only reason to abolish the first sale doctrine -- would mean higher rental prices. Second, both the costs of monitoring each rental transaction and the private costs of enforcing the copyright laws would increase if the first sale doctrine were abolished for video. Today video library owners keep whatever records they need for themselves. Under the proposed new law, each such transaction would also have to be reported to the copyright holder, and arrangements made for collecting and transmitting payments.

Abolition of the first sale doctrine also would greatly increase the costs of enforcing the copyright laws. Whereas today those who reproduce and sell multiple copies of copyrighted material without permission from the copyright holder are the infringers, if the first sale doctrine were abolished, anyone who sells or rents a cassette without permission would be liable. Indeed, technically it would be illegal to sell an old cassette at a garage sale or perhaps even bequeath it at death without that permission.

Second, abolition of the first sale doctrine will lead to a significant reduction in the number of video libraries. The significant increase in price of rentals to viewers would mean that fewer people will rent prerecorded cassettes. This in turn will reduce the number of video stores that can survive in the market.

Third, the reduction in the total size of the video cassette rental market will mean a slowdown in the development of programming intended for video cassette rentals and sale. This is more likely to the extent that the outlets that remain are not specialty video dealers with some interest in keeping in touch with the latest developments in the industry, but rather are stores that maintain some inventory to satisfy a general demand but that find it too expensive to maintain an inventory of much beyond the most popular titles.

In summary, the proposal to abolish the first sale doctrine is a request for Congressional action to further the cause of price discrimination in the movie industry -- counter to almost a century of legislative efforts to outlaw it in almost every other industry. Moreover, it is a call to restrict and impede the development of a new market for information. Hard copy video technology accessible to the home is still a new phenomenon, but it offers promise as a means of opening up avenues into the home for new voices not yet heard and new products that may not yet be apparent.

IV. CONCLUSIONS

Congress has before it three proposed changes to the copyright laws. One has unanim[illegible] approval and should be enacted quickly: making home videotaping of signals received in the home not a copyright infringement. This action is not to sanction piracy: making multiple copies for sale would rightfully remain a blatant infringement. It would, however, permit consumers to use a new technology that shows large public benefits without any detriment to the copyright holders.

The other two proposals should not be enacted. One would impose a tax that would reduce the benefits to be derived from this new technology, but would not further the fundamental purposes of the copyright laws -- namely to encourage further creativity by ensuring that creators are rewarded for successful creations. Such ownership means that the creator has an asset that he can sell in the market where the forces of supply and demand will set a price on the creative effort. That price will be determined fundamentally by how well consumers like the creation. The tax proposal, on the other hand, would offer payment divorced from consumer acceptance of creative effort, payment, moreover, that would be in addition to the market outcome.

The other proposal that should not be adopted is the abolition of the first sale doctrine. Indeed, it is perhaps ironic that as video moves to become more comparable to print -- available in hard copy for people to view and review at their own will and at a time convenient to them -- the long-standing doctrines that have always, and for excellent public reasons, applied should be called into question. The gains to our society from the first sale doctrine in print could well be replicated or even dwarfed by the beneficial effects of videotape libraries in the future. Basically, that doctrine that worked so well in the past has not been shown to be at all broken. You should not entertain notions of "fixing" it.

Senator **Mathias**. Mr. Anderson.

Mr. **Anderson**. My name is Dick Anderson. I am president and part-owner of Sea Coast Appliance Distributors. We distribute RCA TV's and VCR's in the State of Florida, with headquarters in Miami and a warehouse in Jacksonville. I sell to approximately 1,000 retailers and service shops in the State of Florida.

I cannot sing, and I cannot part the Red Sea, and I am not an economist, but I sell these machines that everybody buys. And, before getting into my testimony, I want to make one point perfectly clear. These machines are made in Japan, but this is an American business.

Senator **Mathias**. Are all of them made in Japan? That is the question. Is there any local or European manufacturer?

Mr. **Anderson**. I believe that the VCR's are manufactured today in Japan. However, RCA color TV's are all manufactured in the United States, and I want to make that clear, too. It is a United States product. And the VCR passes through to a TV before you can see it, and before you can play these prerecorded tapes, you have to have the machine. So maybe we ought to just get rid of the machine, and we would not have this problem with the motion picture industry.

Senator **Mathias**. Is there no European production of this type of equipment?

Mr. **Anderson**. I guess there is. Phillips is a Dutch company, but I could not tell you that—I do not sell their things.

Senator **Mathias**. I do not know. I am asking out of ignorance.

Mr. **Anderson**. All sold in the United States are made in Japan. Those sold in Europe, some are made there. But 2 years ago, approximately 13 percent of my sales involved VCR's or video accessories. Today, 30 percent of my business is in the VCR area. And that is true with retailers throughout the country that sell this product. There are more than 60 other RCA distributors throughout the country and what I say is representative to those distributors, as well as other distributors of the other manufacturers.

Returning to my own situation, this is a unique experience for me. I am a Florida State senator and being on this side of the podium is a little different for me. We just finished a regular session, and I am returning now to spend my full time in the electronics business—and, I might say, at a very difficult time. We are in the middle of a recession. We have extremely high interest rates, high unemployment. And, before Mr. Dole left, I was going to ask him if he could not do something about the interest rates, because he would make us all a lot better off in terms of profitabilitv.

But the VCR business requires intensive capital, has intense price competition, and low margins. And I want to impress upon you the fact that there are low margins and intense price competition with VCR's. I find it quite remarkable that economists would get up and say that the $50 increase will not be passed on from the manufacturer to the distributor and from the distributor to the retailer and from the retailer to the consumer. That is just not the way it works in the retail distribution business. When RCA passes on a price increase or decrease to me, I am going to pass that on to my retailer, because there is intense price competition. And when you talk about a $50 bill, as an increase that has previously been mentioned, on the machines that cost at the distributor level between $500 and $1,000. I work on approximately a 10-percent gross margin. Out of that 10 percent must come warehousing, selling expenses, local advertising, and free financing for the dealer. And believe me, Senator, this cost is going to be passed on to the consumer, and in margins when we buy it, and we have to sell it at an increased margin, and the retailer does the same, a $50 bill at manufacturer level will be a $70 or $100 bill at the consumer level. The net result is that there will be fewer machines purchased when this takes place.

When the movie industry today is receiving revenues from copyrighted materials, they receive it six times: when the movie is made, the actors are paid; when it is released for theater distribution when it exceeds gross revenues at the theater; when it is released for network showing, or released for prerecorded cassettes. Today, we have video discs that have not even been talked about—and cable television. That is six times. Are we going to allow them a seventh time to come to the well to get their money? I certainly hope not.

There is one area of television viewing that I was part of for 10 years. I played for the Miami Dolphins. I was president of the Players' Association for 2 years. The NFL says that this type of recording does not infringe upon their right to expand their audience. They are not for the royalty tax. They think if a TV game is taped and someone can watch at a later time, it actually expands their audience; it does not reduce it. But I would be remiss in adding that the NFL in no way sanctions taping of these games for commercial use.

Others have talked about library building. I think it is greatly exaggerated. I have a VCR at home. I have a capacity to have 10 of them at home if I want to. I have one. I have taped one movie. I have not watched it a second time. The commercials are in there, and I get to see them—even though I can go through "search" that is five times fast normal speed, and believe me, you can see the commercials when that happens.

In terms of revenues to the industry, a year ago, they made $35 million from prerecorded cassettes. In 1981, it was $100 million. The royalty rights today are 20 percent of the gross revenue. So when you go from $140 to $500 million, and you get 20 percent of that, the movie industry is making a good bit of money off the prerecorded tapes. In rentals, the rentals of these prerecorded cassettes went from $20 million to $160 million in 1 year with revenues from $4 million to $32 million and now, what is it going to be the next year? And keep in mind, they are already getting royalty rights of 20 percent for all the prerecorded tapes sold and rented in the marketplace.

I do not think anybody can contend that if someone pirates a work that they should not be prosecuted. And I think you ought to look at that area in this committee of pirated works and not, certainly, the in-home, noncommercial, private use. I think that if you put this $50 tax at manufacturer level on the machine, the cost to the consumer would go up $70 to $100, and actually, the movie industry would receive less revenues because the prerecorded VCR's are a boon to their industry.

Thank you.

Senator **Mathias**. Thank you, Senator. I would just point out to you that this committee does concern itself with pirating, and last year, we had hearings on that very subject.

[Prepared statement of Richard Anderson follows:]

Testimony of
Richard Anderson
President, Sea Coast Appliance Distributors, Inc.
Before the
Senate Judiciary Committee
April 21, 1982

Mr. Chairman:

My name is Dick Anderson and I appreciate the opportunity to testify before you today in support of the passage of S. 1758, in its present form, which would confirm the right of the American consumer to use video cassette tape recorders to tape off-the-air copyrighted programming for in-home, private, non-commercial use.

I am the President and part owner of Sea Coast Appliance Distributors, Inc., a wholesale consumer electronics distributor, which distributes RCA consumer electronics products in Florida. My company is headquartered in Miami with warehouses there and in Jacksonville, and our operations are in support of nearly a thousand Florida retailers and electronic service shops.

Before getting into some of the specifics of my testimony I briefly want to comment on the suggestion made by some people that the video cassette recorder (VCR) issue involves, on the one hand, the property rights of U.S. authors and composers and, on the other, a basically Japanese business. This is absolute nonsense! Nearly 30 percent of Sea Coast's business is attributable to VCRs,video color cameras, and other VCR accessories; and to us this is very much a United States business. It is important to us, it is important to our Florida retailers, it is important to electronic service shops in Florida, and it further is important to the local communications media (print and broadcast) used for advertising and promoting the sale of these products.

There are more than 60 other RCA distributor locations throughout the United States and the comments I make concerning Sea Coast and Florida are equally pertinent to those other market areas. In fact the VCR business is a key element in the U.S. consumer electronics industy.

Returning now to my own situation, I find it a rather unique experience to give testimony from this side of the table as I'm also a State Senator in Florida representing Dade County. We have just completed our regular session and a special session on reapportionment, and I am just now returning to devote my full attention to our consumer electronics business at a time when we face serious difficulties -- high unemployment; high interest rates that significantly impact the cost of carrying inventory in this business which requires intensive investment of capital funds; and intense price competition and low margins which make it difficult to achieve profitability.

I want to emphasize this last point, intense price competition and low margins, because there are some who have the mistaken belief that a royalty tax on video cassette recorders (VCRs) and blank cassettes will not be passed on to consumers and will instead be absorbed by manufacturers, distributors, and retailers. Mr. Chairman, in the consumer electronics business that is not living in the real world!

First of all, video cassette recorders are costly -- ranging from $500 to $1,000 at the manufacturer cost level -- and are sold at low margins at both wholesale and retail. The effect of an ill-advised royalty tax or surcharge at the manufacturer level ($50 per VCR and $1-2 for blank cassettes are taxes frequently mentioned) will reduce my profit and also inhibit my ability to carry an adequate inventory of VCRs. The same is true for my retailers.

In distribution of VCR products, we as distributors work very hard to achieve a 10% gross margin on the product. Out of that slim margin must come warehousing and selling costs, local advertising, and free financing or "floor planning" -- and these days that is a particularly expensive business cost. These costs add up to a very tight selling price to dealers which leaves no room for money to be absorbed by the distributor. And manufacturers are not doing much better in meeting their own escalating costs in a depressed consumer economy.

Any new cost cannot be absorbed in today's distribution. I firmly believe that a $50 royalty tax, if introduced into the cost structure, will result in a consumer price increase of $100 or more because it will have to be treated as a new business expense. It will be included in the basic price and mark-ups taken at each stage of distribution before it reaches the consumer. That precisely is the way the world operates in distribution and retailing.

The obvious result is the consumer very likely would think twice about making the purchase, and this could result in a domino effect "back up the line" leading to downward adjustments of inventory and production.

At this point I want to address Senator Mathias' bill, S. 1242, and the inequities I perceive with that legislation in the context of time-shift viewing. First of all I think time-shift viewing (in the home for private, non-commercial use) is fair use of copyrighted material. And second, it is my view the motion picture industry acquires added exposure through such viewing and is not "short changed" in any way.

It collects when the movie is made and released for theater distribution. It collects again when the gross receipts exceed a given threshold. It collects again when it is released for network showing. It collects again when released in the form of pre-recorded cassettes. It collects again when released on video discs. It collects again when released for use on cable television. That is six times. Should it collect a seventh time by way of a VCR royalty tax? I think not and hope you will agree that this would be unconscionable where time-shift viewing is involved.

Before leaving the subject of time-shift viewing, I want to point out that there are situations apart from movies where time-shifting appreciably increases the viewing audience. A case in point involves televised National Football League games. As a former 10-year member of the NFL and past President of the NFL Players Association, I have been in touch with Commissioner Rozelle's office on taping NFL professional football games. The Commissioner's office has informed me it has no objection to VCR owners taping these games for in-home, private, non-commercial use. It is their view that this programming, which is rated highly in terms of viewing audience, when taped for in-home use actually expands the viewing audience and stimulates and increases interest in professional football. I would be remiss in not adding though that the NFL in no way sanctions taping the games for commercial gain.

How many people on your committee, Mr. Chairman, or on your staff, have VCRs at home to watch programs you may have missed while you were in a late session or attending a legislative function? Surely that kind of use should not be considered as copyright infringement. I'm well aware of the arguments concerning "library building", but my personal view of that is that it's very much overstated. Those who do that first of all get the commercials seemingly every few minutes. And, of course, people taping programs while away from home don't have the ability to "edit out" commercials without later taking special steps to do so.

I have a VCR in my own home and have taped a number of movies and other programs but, with the exception of home movies made of my own family using my own color camera, almost always tape over them to record other programming. When I have a special interest in a movie, I either rent or buy a pre-recorded cassette or a video disc.

In at least one respect the motion picture industry has specially benefitted from VCRs, and that is in the area of pre-recorded cassettes. Without recorders there would be no vehicle for playback of such cassettes and the attendant royalty income. In 1980 about 3 million pre-recorded cassettes were sold producing revenues of about $175 million. In 1981 the number of cassettes sold grew to 5 million with revenues of nearly $500 million. With a royalty being typically $10-15 per cassette, you can see that the royalty income for the movie makers is quite substantial. Further in this area is the growing availability of pre-recorded cassette rental programs. Even with what most likely are under-reported results, there were 1980 revenues of $20 million rising dramatically to $160 million in 1981.

No one countenances recording copyrighted materials and their subsequent sale for commercial gain. If legislation is needed, I submit it should be in that area. The tape pirates are the "bad guys", not consumers who use recorders for in-home taping for private, non-commercial use.

Mr. Chairman, a royalty tax on VCRs which would apply to in-home use is, in my judgment, ill-conceived and would be harmful to the VCR industry, the consumer, and even the motion picture industry. I therefore urge passage of S. 1758 in its present form and rejection of S. 1242.

Thank you.

Senator **Mathias**. Mr. Kummel.

Mr. **Kummel**. Mr. Chairman, I am Eugene H. Kummel, and I am chairman of the board of directors of McCann-Erickson Worldwide, an advertising agency. I am also the immediate past chairman of the American Association of Advertising Agencies, an association of 545 of the leading national and local advertising agencies throughout the United States.

I have been in advertising for almost 36 years.

The purpose of my testimony is to support proposed legislation which will allow an individual to record TV programs if the recording is made for private use and not used in a commercial nature. However, I do not support the proposal to impose a royalty on the VCR machine and VCR blank tapes.

McCann Erickson currently represents Sony and prepares advertising for the Betamax VCR. So my company has a short-term interest in the outcome of that case, which the Supreme Court now has been asked to review. But we have a long-term interest as well. If VCR's had the impact claimed by some, we would lose free television as a medium. I do not believe they will have that effect.

We at McCann see VCR's as increasing the number of people who can see our commercials.

The first point I would like to make is that the copyright owner is already being compensated fairly for his labors. As the chairman of a leading worldwide advertising agency where our main stock in trade is our creative output, I am for fairness in compensating creative people for their efforts, as much as is feasible. However, "as much as is feasible" means "fairly," which in turn must take into account that we cannot be unfair to the advertiser who pays the bill, or to the consumer who ultimately bears the total cost of developing new products, and advertising them for sale. Let me explain this.

When a copyright owner licenses his program to a broadcaster, he asks for a certain fee. After negotiations between the parties, the terms of the deal, including the fee, are agreed upon. This negotiation takes into account many factors including the type of program, the stars, the audience it is directed to, when it will be broadcast, its track record, its previous exposure, the estimated number of people who will watch it, and probably a dozen other factors. This is a decision arrived at by the two parties in a free marketplace environment. If the fee is not large enough, the copyright owner does not have to license the program. If the fee is too large, the broadcaster does not have to agree to pay for it.

One of the factors both the copyright owner and the broadcaster consider when they negotiate the fee is the size of the expected audience, including those who tape a program for later viewing.

When the broadcaster and an advertising agency negotiate the price an advertiser will pay to sponsor a commercial in the program, both the network and the advertising agency consider the size of the audience, including those who tape it for later viewing. No distinctions are made between these two segments of the audience. Once again, market forces come into play, and the broadcaster and the advertising agency come to agreement on the price that will be paid. When the program is broadcast, the Nielsen people measure the number of people who watch, including the number of people who tape the program. Since the moneys paid the producer take into account the tape audience, I believe an additional royalty payment to copyright holders is double payment and unfair to viewers.

Second, as an advertising agency, we have confidence in free advertiser supported TV, and clearly believe that the added viewers the video cassette recorder brings are of value to our clients. We also have confidence that viewers will not skip through or erase commercials in any great numbers. It is my personal observation, after more than 35 years in advertising, that most people do watch commercials, want to watch them, and that they are not now, and will not in the future continually skip the commercials or continually use the fast-forward on commercials when relaying tapes. Nina Cornell has already referred to a statement made by Mr. Valenti. Since he made it twice, I will refer to it again.

Reference has been made to a Media Stat survey which asked VCR users: "Do you delete commercials?" Eighty-seven percent said that they had. As Ms. Cornell pointed out, the 87 percent is not 87 percent of all VCR owners; it is 87 percent of the 23 percent who viewed the program while recording.

I have no reason or evidence to believe that behavior will change as the VCR market grows. There is a big difference between what people say and what they actuallv do about their exposure to TV commercials. Contrary to an opinion expressed before by Mr. Eliasberg, formerly of CBS, the free TV market is healthy and will remain so.

As just one example, a report issued in March 1982, by the CBS Broadcast Group entitled, "The Video Marketplace in 1990, Diversity and Growth in Perspective." CBS states, and I quote:

> The networks' share of the evening audience will decline to 70 percent. However, due to the growth of the TV household base, absolute audience delivery in 1990 will actually be higher in 1981.

CBS is not alone in this view. In their 1981 annual report just issued, the American Broadcasting Co., states:

> As the new technologies grow in audience, traditional broadcasting's share of the total television audience will decline, perhaps to 75 percent or less by the end of the decade, but its audience will still be larger in absolute terms because of the growth of the total viewing audience.

That hardly sounds like free TV is on its way out.

My third point is that we believe consumers should be entitled to watch shows and/or commercials when they want, at their convenience, and that VCR's really provide that option. It is called "time-shifting." I would be happy to go into greater detail on the points made in my testimony, but I thank you very much for this opportunity.

Senator MATHIAS. Thank you, Mr. Kummel.

I would just observe that I think the questions propounded by the committee this morning indicate that there is an awareness of the committee that there are several aspects of the problem. One is the economic aspect, which you have addressed yourself to. I think there is also a question of the quality of the artistic and intellectual performance.

Mr. **Kummel**. There was one other thing, Mr. Chairman. Mr. Heston touched on it, but I do not think he went into it completely enough. They seem to be looking very much on the gloomy side of this thing, but there is a brighter side. The one thing that both we and Mr. Valenti and his group will agree upon, is that a lot of software is going to be needed, which means more jobs for writers, artists—this is for all of television, including cable. One great thing they need is this software.

There is one other thing that I have noticed in my 35 years, and Mr. Heston touched on it, which is that people tend to look on things on the gloomy side. I can remember when television first came in, because I entered the industry then. The people who owned radio at the time were afraid they would be out of business, but if you had held onto your radio station or invested in it, you did very well.

He also mentioned live television going into film. I happened to sponsor one of my clients, "Playhouse 90," when it first came on the air. There was quick alarm from everyone that the movies would be rushed out of business. It did not. It ushered in movies on television.

He also mentioned the people with commercials. There was a time when actors did not want to appear in commercials. Today, it is not only "in," but people are very well compensated for it, and they make the commercials more effective. So there is a bright side to this whole thing.

Senator **Mathias**. Thank you.

[Prepared statement of Eugene H. Kummel follows:]

TESTIMONY OF EUGENE H. KUMMEL, CHAIRMAN OF THE BOARD OF McCANN-ERICKSON WORLDWIDE BEFORE THE SENATE JUDICIARY COMMITTEE CONSIDERING A REVISION OF THE COPYRIGHT LAW

APRIL 21, 1982

I'm Eugene H. Kummel, and I am Chairman of the Board of Directors of McCann-Erickson Worldwide, an Advertising Agency that bills in excess of $1,900,000,000 per year with revenues slightly less than $300,000,000.

I am also the immediate past Chairman of the American Association of Advertising Agencies, an association of 545 of the leading national and local agencies throughout the United States. The views I am expressing, however, are my own.

I have been in Advertising for almost 36 years...having entered the profession after returning from 3-½ years service in the U.S. Navy.

The purpose of my testimony is to support proposed legislation which will allow an individual to record TV programs if the recording is made for private use and not used in a commercial nature.

However, I do not support the proposal to impose a royalty on the VCR machine and VCR blank tapes.

McCann-Erickson currently represents Sony and prepares advertising for the Betamax VCR. So my company has a short-term interest in the outcome of that case which the Supreme Court now has been asked to review. But we have a long-term interest as well. If VCRs had the impact claimed by some, we would lose free television as a medium. I do not believe they will have that affect.

We at McCann-Erickson see VCRs as increasing the number of people who can see our commercials. Finally, I have a personal interest also, since I, like 3,000,000 Americans, own a VCR.

The first point I would like to make is that the copyright owner is already being compensated fairly for his labors.

As the Chairman of the Board of a leading worldwide Advertising Agency where our main stock in trade is our creative output, I am for fairness in compensating creative people for their efforts as much as is feasible. However, "as much as is feasible" means "fairly", which in turn must take into account that we can't be unfair to the advertiser who pays the bill or to the consumer who ultimately bears the total cost of developing new products and advertising them for sale. Let me explain this from the point of view of a company that buys a lot of commercial time.

When a copyright owner licenses his program to a broadcaster, he asks for a certain fee. After negotiations between the parties, the terms of the deal, including the fee, are agreed upon. This negotiation takes into account many factors including the type of program, the stars, the audience it is directed to, when it will be broadcast, its track record, its previous exposure, the estimated number of people who will watch it and probably a dozen other factors. This is a decision arrived at by the two parties in a free marketplace environment. If the fee isn't large enough, the copyright owner doesn't have to license the program. If the fee is too large, the broadcaster doesn't have to agree to pay for it.

Remember that if we are talking about a movie, the copyright owner has already received prior payments in most cases. He has received payments for ticket sales at movie houses and he may have received payments from pay-cable TV broadcasts, from the sale or rental of pre-recorded cassettes for use in the VCR and from foreign sales.

One of the factors both the copyright owner and the broadcaster consider when they negotiate the fee is the size of the expected audience, including those who tape a program for later viewing.

When the broadcaster and an advertising agency negotiate the price an advertiser will pay to sponsor a commercial in the program, both the network and the advertising agency consider the size of the audience, including those who tape it for later viewing. No distinctions are made between these two segments of the audience. Once again, market forces come into play, and the broadcaster and the advertising agency come to agreement on the price that will be paid.

When the program is broadcast, the Nielsen people measure the number of people who watch, including the number of people who tape the program.

Since the monies paid the producer take into account the tape audience, I believe an additional royalty payment to copyright holders is double payment and unfair to viewers.

Now I would like to speak to my second point that the market will continue to pay for audiences delivered by home taping and that the market for programs on free television will not be diminished by the use of VCRs. We in the advertising industry know that people do watch commercials. We believe they do so not merely because they are there, but because people believe they gain something by watching them. We do not think that just because there is a new technology, people will cut out the commercials when they tape programs or will fast-forward through them. There is no evidence showing that tapers view fewer commercials than real-time television viewers.

Reference has been made to a Media Stat Survey which asked VCR users: "Do you delete commercials?" 87% said they had.

Let me point up two things. First the 87% is not 87% of all VCR owners. It is 87% of the 23% who view the program while recording. Most people do not watch and tape at the same time.

Second, the way the question was asked, "Do you ever erase or skip a commercial?" That's about the same as asking "Have you ever left the room during a commercial break on regular television to get a snack or go to the bathroom?" I'm sure everyone has done this at least once. The question doesn't measure how often this practice occurs.

What people gain when they watch commercials is information. In many attitude studies about television commercials, such as a study of media involvements conducted by Opinion Research Corporation in January-February 1979 we find that television advertising is considered usually informative about products, helpful as a buying guide, and appealing.

Over the last decade, many viewers have had new television sets equipped with remote controls that allow viewers to turn off the sound during commercials or even change the channel, and other distractions that allow decreased attention to commercials. Yet studies of the effectiveness of new first-run commercials conducted by Burke Marketing Services show that on average, the same percentage of program viewers could recall the commercial message up to twenty four hours later at the beginning of this period as now. The stability of this recall figure suggests that people are not all that eager to stop watching commercials.

In summary it is my personal observation after more than 35 years in Advertising that most people do watch commercials, want to watch them, and that they are not now and will not in the future skip the commercials or use the fast-forward on commercials when replaying tapes. I have no reason or evidence to believe that behavior will change as the VCR market grows. There is a big difference between what people say and what they actually do about their exposure to TV commercials.

Contrary to the opinion held by others the free TV market is healthy and will remain so. As just one example in a report issued in March 1982 by the CBS Broadcast Group entitled "The Video Marketplace in 1990, Diversity and Growth in Perspective" CBS states, and I quote:

> The networks share of the evening audience will decline to seventy percent; however, due to the growth of the TV household base, absolute audience delivery (in 1990) will actually be higher in 1981.

CBS is not alone in this view. In their 1981 Annual Report the American Broadcasting Company states, and I again am quoting:

> As the new technologies grow in audience, traditional broadcasting share of the total television audience will decline, perhaps to seventy-five percent or less by the end of the decade but its audience will still be larger in absolute terms because of the growth of the total viewing audience.

That hardly sounds like free TV is on its way out. Also the amount of time available to view TV is expandable. After consumers purchase a VCR, research has shown viewing time increases.

Now let me address my third point which is that viewers should be entitled, for their own convenience to record television programs for later viewing. We have all heard that the FCC licenses stations to operate in the "public interest, convenience and necessity".

The public has never been able to control what it wanted to see when it wanted to see it until now. For the first time the VCR machines permit a television viewer to watch a program at his convenience. If there are two blockbuster movies on at the same time, the viewer can watch one and tape the other to watch at a later time. There is a considerable body of evidence that clearly indicates this activity called time-shifting is the primary use of VCR.

The purpose of the copyright law is to encourage authors through financial rewards to "promote the progress of science and useful arts". The reward to the author is not the sole purpose of copyright protection. The author is entitled to compensation but he is not given copyright protection purely as a money making machine. The ultimate purpose of the Copyright Act is to promote the dissemination of information and the arts to the public. That means that television viewers should have the opportunity to see and hear what the author has created. The VCR enhances that opportunity.

In conclusion let me state that I strongly believe that one, the copyright owner has already been fairly compensated for his work; two, home recording will continue to be an expansion of the audience so it will not hurt the market for programming on free TV; and three, the viewer should have the right, without paying an additional tax, to record programs for his private use at his convenience.

Senator MATHIAS. Ms. Foreman.

Ms. FOREMAN. Thank you, Senator.

I am Carol Tucker Foreman. I am here today representing the Home Recording Rights Coalition and, to some degree, the interests of 10 million Americans who live in homes with video cassette recorders.

Since the ninth circuit court's decision in the *Sony* case, it has been illegal for us to use our machines to tape telecast material. The court's decision may or may not be good law, but it is bizarre public policy.

We are told that private videotaping is copyright infringement, a Federal violation. Since most of us are law-abiding citizens, we find that position unacceptable. We certainly hope that the Congress will act as expeditiously as possible to remove the stigma of illegality that hangs over each use of the VCR. We hope you will do so in a fashion that does not impose either some complex regulatory structure, or a financial burden that would make it effectively impossible for us to use this new technology and would deny artists the benefit of the new markets it creates.

The public has a constitutionally protected right to a free flow of information. Both courts and the Congress have always balanced the interests of the public's right to know with the copyright holder's interest in protecting his economic well-being. There has always been a very special consideration for the public's right to information over the airways.

The ninth circuit treated the public's concern for this information in a rather cavalier fashion. That may have occurred because the user's rights and concerns were not argued in court—at least not effectively. The individual defendant in the *Sony* case agreed to be sued, had a client relationship with the plaintiff, had no separate attorney, and presented no case on behalf of consumers.

The ninth circuit refused to acknowledge that there is any information value to the material that is taped. Television is an entertainment medium, but it is also the source of a great deal of public affairs and scientific information, and as we saw this morning, of serious artistic work. Surely, Congress is sensitive to the importance of television in today's marketplace of ideas. It is overwhelmingly the primary source of news, as well as entertainment, for the vast majority of Americans.

The ninth circuit and the opponents of S. 1758 would have you believe that VCR's are used for nothing but lifting copyrighted material. Data presented this morning show that is not the case. But it is clear that some material is taped from the air, usually for the purpose of time shifting.

The Motion Picture Association fears that time shifting will diminish the value of their product. Data presented today indicate that time shifting enlarges the audience and enhances the value of the product.

As for concern about producers' loss of control over what time a show is viewed, I do not think the copyright laws were ever intended to set performance standards for viewers. I pay for so-called "free" television by watching the commercials, and I should be able to watch whenever I please.

There is a tension between the interests of copyright holders and the viewing public, but there are obviously common concerns as well. We have an interest in encouraging creativity by protecting the financial interests of those who generate artistic works; and if there is a loss to copyright holders, they should certainly be compensated for it. No loss has been demonstrated to this point.

I think the argument that libraries will be created is the most speculative of those. There is little on television now that would warrant keeping a $15 or $20 tape for a long period of time.

I am particularly troubled that representatives of the movie industry argue that VCR's are instruments by which some foreign-owned corporations are ripping off poor, starving American artists. I think it is very important that we all understand that the copyright holders in question here are very large corporations themselves, many of them with very substantial foreign interests. Barclays Bank of London, England, owns a major portion of the film "Reds." "Chariots of Fire," which won the best movie Academy Award this year, is a totally foreign-owned film. I raise that only because I think charges that VCR's are an attempt by foreigners to get a free ride on the backs of America's creative genius are jingoistic and should be beneath the dignity of the people who are making them.

Finally, I think we have a right to use our machines without being subject to the vicissitudes of a regulatory body that was set up to mediate between segments of an industry, and not to serve the public's interest. Proceedings before economic regulatory bodies have traditionally been competitions between segments of an industry, with the consumers' interests argued very poorly, as it was in the *Sony* case, or not at all. I do not think that any amount of tinkering with the structure of the Copyright Royalty Tribunal is likely to turn that body into a forum where the users' interest in VCR's will be adequately represented, and nothing is likely to make it into a body that will resolve the issue very quickly.

There is a major consumer interest in this issue. It was not considered by the court. It is ignored by the Motion Picture Association. The Copyright Royalty Tribunal is not equipped to deal with it. I hope that Congress will by rapidly enacting S. 1758. Thank you.

Senator MATHIAS. Thank you very much.

Ms. Foreman, you anticipated my question, which was to be whether you would prefer the decision of the Ninth Circuit Court of Appeals or the Mathias amendment. But I think perhaps you have commented enough on that.

As far as the genuine concern over the archival quality or archival aspect of this problem, whether people are in fact storing these tapes and sharing them with their neighbors and making other copies, I would have to believe that if the tapes were all of the "Mission Impossible" variety and went up in smoke after the first time they were played, that we would not be here together today.

Ms. FOREMAN. Sir, if I could just comment on that for a minute. The tapes cost $15 to $20 right now, without a royalty fee on them.

Senator MATHIAS. Some of them, a little more than that.

Ms. FOREMAN. Yes, sir. You can rent a film of a good movie, uncut, with no commercials in it, for $5 for three days. My family has a VCR, and we make rather frequent use of it for that purpose. We have two tapes at our house. One was purchased and given to us by a friend—it is "Casablanca", which is one of those rarities that is worth watching again and again. The other one is a blank tape, and we use it for time-shifting, and programs stay on it for about a week, before we erase them and put something else on there.

If it could be demonstrated that there were large libraries of tapes, then I think that you might have a separate problem. But there has been no diminution of rerun rights as a result of these 3 million video cassette recorders out there. Business is still being done. And I think to assess a fee in the absence of proof is not acceptable.

Senator **Mathias**. Well, I think that is an interesting comment. I have to weigh that against the projections which have not been challenged so far in these hearings, that we are going from the million or so in existence today to 30 or 40 million in a fairly short time.

I do not want to cut anybody off, but we have got two more panels, and it is now 12:20.

Mr. **Anderson**. Senator, if I may just make one point, if I could.

Senator **Mathias**. If you could make it very briefly, Senator.

Mr. **Anderson**. Today, there are 35,000 prerecorded tapes in existence, in a book that you can get that shows where you can buy them. The total revenues went from $175 million and 3 million tapes last year, or the year before last; to 1981, it went to 5 million tapes and $500 million. Now, the 20 percent figure from that that went directly to the motion picture industry was $35 million to $100 million. That is how bad the motion picture industry is getting hurt—an increase of $65 million directly into their pockets. That does not include the rentals, that went from $20 to $160 million. And of that, they received from $4 to $32 million in their pockets. The last point being, portable VCR's have not been talked about or cameras or home use. By 1985, the industry tells me that 50 percent of the machines I sell will be portable units. That is how I use my VCR, and I think that in looking at this item, you have to look at the technology and how other people are going to use it.

Senator **Mathias**. Charley, one word?

Mr. **Ferris**. Yes, one point, Mr. Chairman. Look at the bright side of 35, 40 million VCR's by 1990. Look at time-shifting from the standpoint of what that could do to the broadcast spectrum. The graveyard hours from midnight to 6 in the morning, where stations go dark, that could be used effectively by the broadcasters to put programing that does not make the cut now by the normal commercial standards on television. I envision children's programing, at 3 to 5, being captured by these 35 to 40 million VCR's and viewed during the day. These will all be sponsored by advertisers. They will provide an opportunity for the creative community to ventilate much more of their creation than presently is being presented through the restricted methods of distribution. So I think there are bright sides. The glass can be looked at as half full rather than half empty. I think Hollywood at first always sees these new technologies as half empty.

For the record, I just want to say that all VCR's sold for consumer use in the United States are made in Japan. There are VCR's made by European manufacturers that compete in other places in the world.

And one other point that was made, so you do not confuse our position, Mr. Chairman, is that we do not object at all to Hollywood getting a royalty from every use, whether it be six uses or whether it be from 10 uses. What we object to is the demand of Hollywood to be paid twice for the same use. And that is how we perceive a tax, a surcharge, a royalty tax, whatever it may be called, on a VCR—constituting being paid twice for the same use because the marketplace mechanism is permitting the negotiation of what that royalty fee should be for over the air television. And any surcharge on the VCR or blank tapes is going to constitute double payment for that use. The consumer would pay first through advertising costs and second through a royalty tax.

Senator MATHIAS. Thank you very much, ladies and gentlemen.

[Prepared statement of Carol Tucker Foreman follows:]

STATEMENT OF CAROL TUCKER FOREMAN, CONSULTANT, HOME RECORDING RIGHTS COALITION

Mr. Chairman, I am here today representing the Home Recording Rights Coalition and, to some degree, the interests of 10 million Americans who live in homes with video cassette recorders.

Late last year the Ninth Circuit Court of Appeals ruled that noncommercial use of videotape recorders to tape copyrighted, telecast, audiovisual materials constituted a copyright infringement for which manufacturers, distributors, advertising agencies, retailers and users of videocassette recorders are liable for damages. Damages for use by a private citizen of a VCR might run to $250 for every infringement—that is every program taped. The Court's decision may or may not be good law, but it is bizarre public policy. The public has been told that private videotaping is a violation of the law. The Congress should act as quickly as possible to alleviate the uncertainty and conform the law to common sense and expectations.

Further, you should reject all efforts to capitalize on this peculiar and chaotic situation in order to impose new taxes on purchasers and users of video tape recorders.

It is clear that the court case involved here did not adequately consider or, perhaps, the copyright law failed to anticipate the rights and concerns of the consuming public in this rapidly changing technological age. Surely Congress should do so.

There are at least four important public policy concerns that must be considered.

First, the consuming public has a strong, constitutionally protected interest in a free flow of information. The Ninth Circuit decision undermines that right. Second, the consuming public has an interest in encouraging creativity by protecting the rights of those who create artistic and intellectual works. Third, the consuming public has a right to expect Congress to act expeditiously to remedy a situation that places a stigma of illegality on the use of VCR's and which creates an absurd and unenforceable legal standard. Finally, the public has a right to expect that Congress will provide a solution to this problem that does not impose a new regulatory structure or a great financial burden that will effectively deny consumers the use of this technology and manufacturers the right to benefit from the expanded market it provides.

Mr. Chairman, the consuming public has a strong, basic and constitutionally protected interest in securing a full and free flow of information. The courts and Congress have recognized this over the years and have attempted to balance the public's need to know and the copyright holder's need to protect his economic interest. There has always been special consideration for the public's need to receive information over the airwaves and both Congress and the courts have consistently ruled that, in this case, the public's need is paramount to the interests of disseminators of information.

However, the Ninth Circuit treated the public's concern for broadcast information in a rather cavalier fashion. This may have occurred because the VCR user's rights and concerns were not effectively advocated in the record. The individual defendant in the *Sony* case agreed to be sued, had a client relationship with the plaintiff, had no separate attorney, and presented no case on behalf of consumers. Congrees must move beyond the concerns of industry segments and give serious consideration to the legitimate concerns of the viewing public.

The Ninth Circuit refused to acknowledge any information value to material taped for entertainment or convenience. I believe that an incorrect and extremely limited view. Television is an entertainment medium but it is also the source of a great deal of public affairs and scientific information and of serious artistic work. The Court placed no information value on the one show it mentioned—a cartoon—but surely Congress is sensitive to the importance of television in today's marketplace of ideas. It is overwhelmingly the primary source of news as well as entertainment for the vast majority of Americans. Access to it should not be impaired.

Although television may not be the preferred source of entertainment for the members of the Court, the entertainment value of television and VCRs should not be demeaned. Entertainment is important and there is some societal benefit to having low-cost family entertainment available. Today a family evening out at the movies hardly qualifies as inexpensive but an evening at home with a rented movie may.

The Ninth Circuit and the opponents of S. 1758 would have you believe that VCRs are used for nothing but lifting copyrighted material from the airwaves. This is simply not the case. There is now a thriving business in the sale and rental of prerecorded tapes. In fact, the New York Times recently noted that this year the largest movie producers will for the first time make more money from the sale of prerecorded cassettes than from the sale of movies to television. Further, some broadcast material is not copyrighted. For example, many public broadcasting stations do not copyright their material. And finally, there is a growing use of recorders for making personal videotapes. Certainly VCR users should not be prohibited from or taxed for these actions which cannot violate the rights of copyright holders.

However, some material is taped directly from the air—usually for the purpose of time shifting. Time shifting is simply recording material from the air and replaying it at a more convenient time. It must be understood that consumers have paid for that use. If material is taped from so-called "free" television, it has commercials in it. The VCR user tapes the commercials along with the program. They are right there when the tape is played and every time the tape is replayed. The charge has been made that the fast forward button of the VCR may be used to avoid commericals. However, using the button rquires paying close attention to the screen to make sure that none of the program is missed. It may be less of a problem for the advertiser than a trip to the refrigerator for a beer or the use of a remote control button to peruse other channels during commercials. Mr. Valenti has charged that some new devices will be used to automatically edit out commercials. I'll be more than happy to support legislation prohibiting use of such devices.

The greatest concern of the Motion Picture Association of America appears to be that time shifting will diminish the value of their product. Data presently available instead indicate that time shifting enlarges the audience, enhances the value of their product, and makes it possible to demand higher prices for the initial sale of their works. Both common sense and the rating services tell us that time shifting expands the viewing audience. It permits users to record and view later programs that they would miss either because they are away from home, otherwise occupied or because the program runs concurrently with something else they want to see.

Representatives of the MPAA take severe exception to their loss of control over the time at which material is viewed. It is difficult to generate a great deal of sympathy for that concern. Copyright laws were never intended to set performance standard for users of copyright material.

Mr. Chairman, there is a tension between the interests of copyright holders and the viewing public, but I believe there are areas of common concern as well. Copyright holders want the widest possible distribution of their material. The public, on the other hand, has an interest in encouraging creativity. One way to do that is to protect the financial interests of those who generate artistic works. If any loss to copyright holders can be demonstrated, consumers should support efforts to remedy the problem. However, the case for damage has not been made. All charges are speculative in the extreme.

The Motion Picture Association claims time shifting reduces the value of their product. Yet it has been shown that this practice enlarges the audience and that audience rating systems credit time shifting in the same way as other viewing. In order to be compensated for this increased use of their product, copyright holders should negotiate higher prices for the initial sale of their product to television.

The MPAA has expressed concern that copyright holders will suffer because consumers will purchase large numbers of tapes, create libraries of programs and thereby deprive artists of the value of their work. The argument really does not stand up to scrutiny. There have been no reports of diminished sale value for reruns.

I expect that this will not be a problem in the future either for several reasons. A videotape sells for $15 to $20. You have to like something on television very much to invest that kind of money to keep it forever. Think back over the last week or so and think about how many series episodes you found so unforgettable that you just had to keep them. There is little motivation to create extensive libraries of program tapes.

Nor is there much incentive to tape and retain televised movies, when it is possible to rent a better print of the same film that has not been edited for television and does not have commercials every few minutes.

I think my family is probably a fairly typical user of VCRs. We have two tapes at our house. One, a gift from a friend, is a prerecorded tape of Casablanca. The other is blank and is used again and again to record Nova, while I'm at work, or Meet the Press on Sunday, or Hill Street Blues. They are retained for about a week before being erased. No one has much interest in retaining the programs. Why, my 12 year old daughter didn't even blink an eye when she erased Luke's and Laura's wedding on General Hospital.

There are clearly some blockbuster movies that might be taped and viewed again and again. The most reasonable way to deal with that blockbuster is to negotiate a blockbuster sale price initially.

Representatives of the movie industry have argued that video cassette recorders are instruments by which foreign-owned corporations are ripping off poor starving American artists. Let us all understand that the copyright holders involved here tend to be major corporations and that many of them are also foreign corporations. Barclays Bank of London, England holds a major interest in the movie Reds and the 1982 Academy Award winner for Best Picture of the Year is the foreign produced film Chariots of Fire.

Charges by the movie industry that VCRs are an attempt by foreign corporations to get a free ride on the backs of the American creative community are jingoistic and should be beneath the dignity of those who have made them.

Whatever impact VCRs have on copyrights holders, whether positive or negative, can and should be resolved in the marketplace. It is unfortunate that the motion picture industry has chosen, rather than to negotiate with the networks, to ask Congress to tax consumers.

Third, Mr. Chairman, Congress should act quickly to remedy this anomalous situation. Everyone knows the the present law, as written by the Ninth Circuit, is unenforceable. It makes lawbreakers of millions of Americans, every day. For Congress to leave the situation this way is, in the words of Dickens' Mr. Bumble, to make the law a ass, a idiot.

Finally, sir, consumers should have the right to use their machines without paying twice and without being subject to the vicissitudes of an economic regulatory body that was set up to mediate between industry groups, not to serve the general public.

There is an unpleasant aura to this process. MPAA and its allies realize that it is very easy to stop a bill from going through the Congress and surely they know that VCR manufacturers, sales organizations, and users must have some remedy from the Ninth Circuit decision. MPAA, I am sure, does not want to kill off the VCR industry. However, in return for letting it live, they would like some ransom.

Consumers really should not have to pay twice for television. Nor should we have to deal with the complexities of the Copyright Royalty Tribunal. It seems ironic that, at a time when Congress has attempted to diminish economic regulation, and return to a marketplace economy in airlines, trucking and other communications areas, there is a serious effort here to begin a new venture in economic regulation. Proceedings before economic regulatory bodies have traditionally been competitions between competing segments of an industry with the consumers' interest argued—as it was in the *Sony* case—badly or not at all. No amount of tinkering with the structure of the CRT is likely to turn that body into a forum where the user's interest in VCRs will be adequately represented and nothing is likely to make it into a body that will resolve the issue quickly.

Those who wish to delay resolving the VCR issue have urged Congress to use this opportunity to resolve one or another of the numerous vexing problems confronting the industry today. Congress should indeed consider and resolve these problems, but not at the expense of leaving this troublesome area unresolved for a long period of time. Remedy the problem created by the Ninth Circuit decision now. Establish procedures for gathering additional information for continuing oversight. If the facts change, reopen and reconsider and revise. But do not leave VCR users standing in the shadow of what the public will certainly perceive as, at best, a technical illegality, but more probably an absurd governmental sanction. Neither the Congress, nor the courts, need further reduction in esteem and, asssuredly, this shortsighted police action will continue to be ridiculed.

Finally, do not submit to the ransom scheme proposed by the MPAA. If Jack Valenti wants to play the troll under the bridge forbidding anyone to cross at risk of his pocketbook, then Congress should play Billy Goat Gruff protecting the rights of Americans to use VCR's.

Senator MATHIAS. Our next panel is Mr. Jack Wayman, the senior vice president of Consumer Electronics Group; Elmer Cooper, and Stuart Eizenstat.

Gentlemen, if you will proceed.

STATEMENT OF A PANEL, INCLUDING: JACK WAYMAN, SENIOR VICE PRESIDENT, CONSUMER ELECTRONICS GROUP, ELECTRONIC INDUSTRIES ASSOCIATION, ACCOMPANIED BY J. EDWARD DAY, SPECIAL COUNSEL; ELMER COOPER, CHAIRMAN, COMMITTEE AGAINST REGULATION OF VIDEO ENTERPRISES, AND OWNER OF VIDEO SUPERMARKET, WASHINGTON, D.C., ACCOMPANIED BY STUART EIZENSTAT, COUNSEL TO THE COMMITTEE

Mr. WAYMAN. Mr. Chairman, my name is Jack Wayman. I am senior vice president of the Consumer Electronics Group of the Electronic Industries Association. We are a 50-year-old trade association headquartered here in Washington, and along with me is J. Edward Day, who has been our special counsel for some 15 years.

Senator MATHIAS. And a distinguished member of the President's Cabinet during the Kennedy administration, and even more distinguished as a citizen of the State of Maryland.

Mr. WAYMAN. He certainly is that, Senator.

Our association, Senator, of course, represents the manufacturers and sellers at the manufacturers' level, of really, all consumer electronic products that you enjoy in your home. We include in our membership the companies who sell these audio tape recorders, and the blank tape manufacturers. There is a list there of some 40 of them, and that constitutes perhaps 90 percent of the sales. So that is who I represent here today.

Now, I appeared before this committee last November on the video copyright issue, because I represent all the VCR and blank tape manufacturers, also.

But my purpose here today is to urge the committee to reconfirm that the audio tape recordings of copyrighted materials, off the air and from phonograph records, when intended only for private, noncommercial use, do not constitute copyright infringement.

You are going to hear pleas following my testimony to change the law to require a royalty tax on all blank tapes and on tape recorders, based on charges that taping is hurting the record industry. But before you adopt a cure that may be well worse than the disease—if there be a disease—that is really attributable to home taping, you should get satisfactory answers to these three basic questions, we feel.

Is the decline in record sales caused by or just coincidental to recent taping activity? Is the magnitude of harm that might be caused by home taping sufficient to warrant public policy concern? And, would the proposed remedy really work?

Let me tell you what you will hear from those who testify after me. They will say that business is bad in the audio software business solely because people use their tape recorders. You will hear about studies and reports that they commissioned which supposedly prove these facts. You will hear about the large number of blank tapes sold for everv prerecorded cassette sold in 1981. But data alone is not proof of cause and effect.

I need not tell you, Mr. Chairman, that we are in a recession. Records are not like food, and when times get tough, record buying can be cut back. But other things are happening in this marketplace as well, and that affects the demand for music generally and for records in particular. And I would like to touch some of them. They have never been told before before any committee.

Audio component sales have recently dropped, just as record sales have dropped. During the seventies, the audio component industry that I represent and the audio software experienced tremendous growth, just phenomenal. Toward the end of the decade of the seventies, for numerous reasons, audio sales, both hardware and software, declined. Between 1979 and 1981, in those 2 years, sales of audio hardware systems fell 16.3 percent. That is REIA figures. During this same period, record sales declined 8.7 percent. That is RIAA figures.

Now, we would like to suggest some reasons why audio hardware and software are down, and they have nothing whatever to do with home taping.

First, let us look at the demographics. The rate of growth of the 15- to 24-year-old population decreased from a 50-percent growth rate between 1960 and 1970 to an 18-percent growth rate in 1970 and 1980. One proof is that over 10,000 secondary schools will close this year. That shows that those teenager purchases are going away. And as we say in our industry, we make these wonderful miracle electronics and hardware and software, but we certainly cannot make teenagers.

In the sixties and early seventies, the Beatles, the Rolling Stones, the Who—they spurred the record sales. The record industry grew rapidly, due to the devotion and the fanaticism of those teenagers.

Now let us see what happened in the late seventies, when that bubble burst. The record sales peaked. "Saturday Night Fever" and "Grease" were released. Those two albums sold over 12 million records. No record will probably ever hit that again. Today, few if any singing groups or show titles have been able to achieve such universal popularity as it did then with today's teenagers. In fact, I would say, Mr. Chairman, how many singing groups or show titles attracting the teenagers today could you name? I cannot name many, myself.

Next, the interests of the teenagers have changed. Their interests as a group in music have become more fragmented. Disco, punk, new wave, country—they do not inspire the broad-based appeal and devotion like that that was obtained by the Beatles and the Rolling Stones.

Now, it is difficult to fill Capital Center over here, and Abe Pollin will tell you that, with anything but the Stones. He just will not book them in. Those rock concerts are not going on. Filmore East closed; Filmore West closed. That was the height of record sales, because they really proliferated it.

Now let us go to another reason. Record purchases may be falling because of the poor quality of the records, of the discs. One retailer reported in a national magazine, defective records, running between 15 to 20 percent for major releases, with some ranging as high as 40 percent. Customers are complaining about that low quality, the higher prices of the albums they buy, and that they only get one or two hits, whereas in the seventies, they got 8 out of 10 out of an album with that proliferation of good music.

The record companies have recently made it harder for retailers to return the unsold discs. The unsold ones used to be 100 percent return. Now they have cut it back to 20 percent return. Retailers are responding by stocking fewer records—in our business, we call it "selling out an empty wagon".

The record companies also have been unresponsive to the demand for quality prerecorded tapes. Most prerecorded tapes are produced on low quality—we call it "low noise" in our business—rather than premium tapes. Record companies have also generally discouraged prerecorded tape purchases, because they do not release that prerecorded tape when or soon after they release the disc.

Now, well-organized piracy and counterfeiting is also hurting the record industry, and we are against that, and we will join them in chasing the pirates, we call it. However, we believe the main reason for the audio slump—and here it is, Senator—is the new wave for today's teenage population, how they spend their time and their money.

The Wall Street Journal recently observed that the time and money teenagers spend on Pac-Man is time and money they are not spending on record collections. Clearly, the Stones and disco are losing ground to the Space Invaders and to the home computers. It is unfortunate, but that is the fact of life, that the video revolution is eclipsing audio. And it may be that there is a fundamental change in the character of music appreciation.

Guitar sales are down 37 percent. It was the height of guitar sales in the sixties and seventies. Listening devices, like this new portable stereo headset became popular. Many artists have switched from records to video concerts, to video cassette music. However, there are still many companies who are successful today in this record business, and do not let them mislead you, both in our industry and in their business, because those companies that have changed to this new technology are making it out there in the marketplace. Many of our companies have looked at how components went down, compacts went down. What happened? Our companies invented and came out with the compact headsets—the so-called Walkman, Jogman, Raceman, Runman. They have come out with the so-called boom box, that portable, handheld stereo. In fact, they use cassettes, and they have recently created a phenomenal new outlet for these record companies. In fact, sales of prerecorded cassettes rose 25 percent by the record industry's figures just this last year. And prerecorded cassette sales would likely have been higher if they would have released those cassettes at the same time they released the record. Many have not done that. They are still dealing with what we call the dinosaur disc.

Now, many record manufacturers have reaped their large profits in these changing times, and let me give you one. MCA is involved in this case, very deeply. They just announced, and proudly so, in the Wall Street Journal, and increase in income and sales return of records in 1981, last year, of 91 percent over 1980. They must be doing something right.

The record companies have also profited from agreements with their recording artists to get into video. Kenny Rogers, Olivia Newton-John have moved to video disc and are putting a lot of their time and effort into that.

We recognize that some people tape records, Mr. Chairman, and some sales are lost, but we do not think the evidence shows how many record sales are lost to taping. Even if this committee believes that those who tape records are significantly hurting the industry, we do not think a royalty tax legislation could be the remedy.

Now, here is the problem. Whether the amount of blank tape used for recording music is 75, 50 percent, how can Congress succeed in separating those who do copyrighted material from those who do not? We think the schools, the journalists, the businessmen, the blind who use recorders to tape noncopyrighted material could be hurt. Even the stenographer today has two tape recorders over there. She would probably have to pay a royalty tax on those tapes.

Now, although you, Senator Mathias, introduced the legislation that gives the CRT the power to consider the matters, we do not see as a practical matter how the CRT can distinguish between the tape recorder and a blank tape used to record a copyrighted program or the baby's first words, or Johnny playing the trumpet.

In conclusion, we do not believe the need for a royalty tax, compulsory license into the free market of audio has been demonstrated. Further bureaucracy is not the answer, especially when you have detailed reporting requirements.

So we urge this committee, before it takes any action on the audio issue, to examine carefully whether the problems of record companies stem from the recession—there is a good reason—piracy, changes in those teenage demographics, individual preferences of the teenagers, and the technology. So we ask this Congress to recognize, as it did in the past, and has been going on 30 years now, that home audio taping for noncommercial use is not a copyright infringement.

I did not allude, as I did in my testimony, my prepared testimony, to any studies. There is a Warner study, however, and none of the survey questions, none of the methodology has been revealed. We think that perhaps Warner should examine whether its own Pac-Man, rather than home taping, is gobbling up those record sales.

Thank you, Senator.

Senator Mathias. Thank you.

[Prepared statement of Jack Wayman follows:]

TESTIMONY
OF
JACK WAYMAN
SENIOR VICE PRESIDENT
CONSUMER ELECTRONICS GROUP
ELECTRONIC INDUSTRIES ASSOCIATION

Description of Our Trade Association and its Membership

My name is Jack Wayman. I am Senior Vice President of the Consumer Electronics Group of the 58-year old Electronic Industries Association ("EIA/CEG") which has its headquarters in Washington, D.C. With me is our long-time Special Counsel, J. Edward Day, a partner in the law firm of Squire, Sanders & Dempsey.

EIA/CEG is the trade association for manufacturers, and sellers at the manufacturer's level, of consumer electronic products including television receivers, audio tape recorders, video cassette recorders (VCRs), television games, home computers, blank tapes for audio and video, and other consumer products. The Electronic Industries Association represents a broad spectrum of electronic products, but the Division which I head, and have headed for 20 years, the Consumer Electronics Group, represents the consumer products.

Our membership consists not only of all the major domestic manufacturers of audio tape recorders, but of many of the leading foreign-controlled manufacturers of audio tape recorders which have manufacturing facilities in the United States.

We include in our membership the following companies which sell audio tape recorders and tapes at the manufacturer's level:

Audio Tape Recorder Manufacturers

Alpine Electronics of America, Inc.
Arvin Industries, Inc.
Blaupunkt

BSR (USA) Limited
Crown International, Inc.
Curtis Mathes Corporation
dbx, Inc.
Delco Electronics Division, General Motors Corporation
Fisher Corporation
General Electric Company
Hanimex (USA) Corporation
Hitachi Sales Corporation of America
Kenwood Electronics, Inc.
Luxman Division, Alpine Electronics of America, Inc.
Marantz Company, Inc.
N.A.P. Consumer Electronic Corporation (Magnavox, Philco and Sylvania)
Onkyo USA Corporation
Panasonic Company, Division of Matsushita Electric Corporation of America
Pioneer Electronics of America
Quasar Company
Sansui Electronics Corporation
H. H. Scott, Inc.
Schneider North America, Ltd.
Sony Corporation of America
TEAC Corporation of America
Toshiba America, Inc.
United Audio Products, Inc.
US JVC Corporation
Yamaha Electric Corporation
Zenith Radio Corporation

Blank Tape Manufacturers

AMPEX Corporation
BASF Video Corporation
Fuji Photo Film U.S.A. Inc.
Loranger Manufacturing Corporation
Maxell Corporation of America
Memorex Corporation
Panasonic Company, Division of Matsushita Electric Corporation of America
Sony Corporaton of America
TDK Electronics Corporation
3M Company
US JVC Corporation

Each of these companies have manufacturing and/or distribution facilities for consumer electronic products in the United States. These member companies represent most of the sellers at the manufacturer's level of audio tape recorders, and also of blank audio tapes.

Purpose of Our Testimony

My purpose here today is to urge this Committee to reconfirm that audio tape recordings of copyrighted materials off the air and from phonograph records, when intended only for private, noncommercial use, do not constitute copyright infringement. We think that this policy, which the legislative history of the copyright law already supports, is as sound as it was in the past. You are going to hear pleas to change the law to require a royalty tax on all blank tapes and tape recorders based on charges that taping is hurting the record industry. But, before you adopt a cure that may well be worse than the disease, if any, attributable to home audio taping, you should get satisfactory answers to three basic questions:

> I. Is the decline in record sales caused by or just coincidental to recent taping activity?
>
> II. Is the magnitude of harm that might be caused by home taping sufficient to warrant public policy concern?
>
> III. Would the proposed remedy work?

I. WHY ARE RECORD SALES DECLINING?

Let me tell you what you will hear from those who testify after I do. They will say that business is bad in the audio software business solely because people use tape recorders. You will hear about studies and reports they commissioned which supposedly prove these facts. You will hear about the large number of blank tapes sold for every prerecorded cassette sold in 1981. But data alone is not proof of cause and effect. I need not tell you, Mr. Chairman, that we are in a recession. Records are not like food, and when times get tough, record buying can be cut back. But other things are happening in the market as well that affect the demand for music generally, and for records in particular.

Audio Hardware Sales Are Also Declining

Audio component sales have recently decreased just as record sales have decreased. During the 1970s, the audio component industry and audio software, experienced tremendous growth. But towards the end of the decade for numerous reasons audio sales, both hardware and software, dropped. Between 1979 and 1981, sales of audio hardware systems fell 16.3 percent. During this same time period, record sales declined 8.7 percent.

Less Gas, Fewer Buyers, Fewer Stars

When American record sales began their decline in 1979, the record industry blamed the sudden rise in gasoline prices as consuming the disposable income of the all-important teenager. Others pointed to changing demographics. The rate of growth of the 15-24 year old population decreased from a 50 percent growth rate between 1960 and 1970, to an 18 percent growth rate between 1970 and 1980. The rapid change in the demographics of the record-buying public was also a factor. A 1979 article in The Economist stated, "[t]he age-pattern of the American population has probably altered the business for good." The article continued, "[a]s the ... record-buying teenagers of the 1960s move into their thirties ... they seem ... to be more careful purchasers, so the market is much more vulnerable to the present dearth of talent."

Indeed, another possible reason for the decline in record sales is the absence since 1979 of blockbuster albums with broad-based appeal. In the 1960s, the Beatles, the Monkees, and the Animals changed from zoology terms to household names. The record industry grew rapidly due to the devotion and fanaticism of teenagers. In the late 1970s, when record sales peaked, Saturday Night Fever and Grease were released. Together these two albums have sold over 12 million copies. Today, few if any singing groups or show titles have been able to achieve such universal popularity with today's teenagers. How many singing groups or show titles attracting today's record-buying teenagers can members of this Committee name?

Interest in Music Fragments and Changes

The interests of teenagers have changed. Their interests as a group in music have become more fragmented. Disco, Punk and New Wave do not inspire the broad-based appeal and devotion like that obtained by the Beatles. For those teenagers in the mainstream who follow top 40 hits, a record may not be a wise purchase when what's "in" changes so frequently and the top 40 radio stations continually play the "in" songs. For teenagers with specialized interests, there are more specialized stations catering to their needs. It may be that in the past few years listening to radio has become more popular than listening to records. Home audio taping cannot be held responsible for the absence of big name groups and show titles with their big time record sales.

Record Companies Add to Problems

Record purchases may be falling also because of poor quality discs. The combination of the increase in the price of petroleum, leading to lower quality vinyl discs, and the development of shrink-wrap packaging which induces warping if the records are exposed to heat, has retailers complaining about a significant increase in defective records. One retailer reported defective records running between 15 and 20 percent for major releases, with some ranging up to 40 percent. Their customers are complaining also about the lower quality, the higher prices and that albums they buy have only two or three hits rather than seven to eight which was the case in the past.

The record companies have recently made it harder for retailers to return unsold discs to the record companies. Where they used to accept (and refund the price of) all unsold records, they now will only take back 20 percent. Retailers have responded by stocking fewer records at higher prices. [illegible]

Record companies have also been unresponsive to the demand for quality prerecorded tapes. Most prerecorded tapes are produced on low noise rather than premium tape. Customers who use tape and desire quality must record their own prerecorded tapes. Record companies have also generally discouraged prerecorded tape purchases by not releasing prerecorded tape when or soon after they released the disc.

Piracy and Counterfeiting Continue

Well-organized piracy and counterfeiting of records for commercial sale is also hurting the record industry. We support harsh penalties for illegal pirating and counterfeiting and we offer our assistance and cooperation to the record industry in fighting this damage. However, the proposed legislation does not address these problems.

Video and Computer Compete with Audio for Consumer Dollars and Time

Record buying may also be taking a back seat to a wholly new way for today's teenage population to spend its time. Recently the Wall Street Journal observed, "[t]he time and money teenagers spend on Pac-Man is time and money they aren't spending on record collections." Clearly, the Rolling Stones and disco are losing ground to Space Invaders and home computers. It may be unfortunate, but it is a fact of life that the video and computer revolution probably have helped cause a sales drop for audio hardware and software.

The Need to Adjust

The record industry will later testify that a large percentage of records never sell enough copies to return their investment. But the electronics industry has also made large investments in products, such as the videodisc player, which have yet to come close to returning the large costs of research and development. But instead of asking for a subsidy, the electronics industry is adjusting its market and product development to the changing market place.

It may be that there has been a fundamental change in the character of music appreciation. Electric guitar sales dropped 37 percent between 1979 and 1980. Listening devices like the portable stereo headset became popular. Many recording artists have switched from records and live concerts to video concerts on cable, videodiscs and videocassettes.

Companies who are successful today in the audio hardware and software industries have adjusted to the changing technologies and changing consumer demand. For example, many audio hardware companies have recognized the consumer's interest in easy to use portable devices like the portable stereo headphone (the Sony Walkman) and the portable stereo (boom box). In fact, such devices which use prerecorded cassettes, have recently created a new outlet for the record companies. From 1979 to 1981, when sales of records fell

8.7 percent, sales of prerecorded cassettes rose 25.7 percent. And, prerecorded cassette sales would likely have been higher if the record companies would have released prerecorded cassettes at the same time or soon after records are made available.

Many record manufacturers have reaped large profits by adjusting to the changing times and taking advantage of the new markets opened by portable devices and videodiscs. For example, MCA, Inc., proudly announced an increase of income from record sales of 91 percent over 1980. Other record companies have also profitted from agreements with recording artists who perform on cable programs, video cassettes and videodiscs.

II. WHAT IS THE IMPACT OF HOME TAPING?

Despite these other reasons for a decline in record sales, the audio industry seeks to blame the home taper for its loss in sales. Well, Mr. Chairman, let's look at the evidence now being presented to Congress.

Last month, a new study on the impact of audio recording was released by Warner Communications, Inc. The results of an additional study by Dr. Alan Greenspan were submitted last week at the House Judiciary Subcommittee hearing in Los Angeles. But neither the underlying survey questions for the Warner study nor the methodology of the Greenspan study have yet been released.

We believe that these studies do not adequately address the economic effects of home taping and are fundamentally flawed. They do not quantify amounts of audio taping for certain specific purposes such as (1) recording off air, (2) preserving records, (3) making customized tapes not commercially available for car and home use, and (4) duplicating tapes or records from the taper's own collection or from borrowed sources. Yet a quantitative breakdown by specific category of taping is critical to assess the economic impact of audio taping since not all taping substitutes for the purchase of prerecorded cassettes or records. For example, a study conducted for the record industry by the Roper organization in 1977 focused on taping from borrowed sources as the best measure of potential lost sales. Even the recent Greenspan study did not view all tapings from borrowed sources as resulting in lost sales.

The taping for private noncommercial use of a record or tape previously purchased by the taper simply should not be regarded as requiring additional payments to the record industry. Alan Greenspan has used data from the Warner study and some unspecified other sources to estimate how much of the taping substitutes for buying records. Those numbers need to be carefully examined. Several problems exist with the conclusions being drawn.

Statements about what people would have bought must be closely scrutinized, especially when the question regards the substitution for a more expensive purchase. This is particularly true when some of the taping leads to products that cannot be bought. About 45 percent of the volume of taping counted in the Warner study was of what they called album equivalents, what I call customizing. People do not like every song on a record and so they build a tape of their favorites. They do this by taping at home in part at least because they cannot buy the same songs together. Is it reasonable that they would otherwise have bought between a third and a half of that number of records when the music they like does not come packaged the way they like it?

Another problem is that the survey does not take into account the smaller number of titles available on prerecorded cassettes. If consumers tape to have music for personal audio equipment and car tape decks, and the only way to get a tape is to make it yourself, that taping should not be counted as displacing a sale of a record.

Indeed, the amount of home taping that the Warner study turned up needs to be verified. Data on record buying gained by asking people how much they buy have turned out to lead to inflated answers. Roper, in 1979, did a survey for the RIAA and found that people said they bought over one and a half times as many records as they actually bought. Similar overstatements on the amount of actual taping may be highly inflated.

III. WOULD THE PROPOSED REMEDY WORK?

Mr. Chairman, we recognize that some people tape records and some sales are lost. But we do not think that the evidence shows how many record sales are lost to taping. Even if this Committee believes that those who tape records are significantly hurting the record industry, we do not think royalty tax legislation could fairly remedy this problem.

A major deficiency of the audio royalty proposal is its inability to differentiate between those who use audio recorders and blank tapes to tape copyrighted music and those who do not engage in such activities.

A compulsory license fee on audio recorders is unfair to those who do not engage in significant amounts of audio taping. In 1979, in response to the request by Senator McClellan, the Copyright Royalty Tribunal commissioned a study of home audio taping. The authors of that study concluded that, "[o]ver half the respondents (57%) do not tape music at all." That study also found that only 7 percent of the households with playback equipment were frequent music recorders.

A compulsory license fee on blank tape is unfair to the substantial number of consumers and businesses who do not use blank tape to tape music. Studies submitted by the record industry seriously underestimate the amount of blank audio tape used for purposes other than recording music. The Warner study seems to include divergent results: one survey question suggests 75 percent of blank tape time is used to record music; another indicates a lower figure of 66 percent. But both figures may be too high, since the total amount of blank tape being used seems to have been derived from a survey of residential households. Thus, the Warner study does not accurately measure the substantial amount of blank tape used for business purposes.

Whether the amount of blank tape used for record music is 75 percent, 66 percent or 50 percent or less, how can Congress succeed in separating those who tape noncopyrighted material from those who do not? We fear that the schools, the journalists, the businessmen, and the blind who use recorders to tape noncopyrighted materials would be forced to pay a royalty tax on the tape recorder and tapes they use. Even the stenographer in this room would likely have to pay a royalty tax on her tapes. Although the legislation introduced by Senator Mathias gives the Tribunal power to consider such matters, we do not see, as a practical matter, how the Tribunal could distinguish between a tape recorder or blank tape used to record copyrighted programming and one used to record a baby's first words or Johnny playing the trumpet.

Even if it somehow were possible to sort out those who tape copyrighted works from those who do not, we question whether the regulatory body proposed by Senator Mathias is capable of handling the task. According to a recent General Accounting Office report, the Copyright Royalty Tribunal has been completely ineffective in those few tasks which Congress has already imposed on it. According to the GAO report, of the five presidentially appointed Commissioners (sitting in 1981) only one had any significant background in copyright issues. Also, only one had any substantive financial or economic background. None had experience in rate setting or regulatory work. Also, the GAO report noted that the Tribunal's lack of a general counsel or any clear criteria on which to base its decisions, hindered its effectiveness.

There are many who question whether the Tribunal should be involved with any compulsory license system which interferes in the market place. As this Committee is aware, last May the Chairman of the Tribunal resigned, suggesting that the Tribunal be abolished because the market place works so much better. And at least one present member of the Tribunal has agreed that the only compulsory license which should be retained is one for cable. Yet the legislation introduced by Senator Mathias seeks to give the Tribunal unbridled discretion in not only distributing royalties, but in imposing them as well.

IV. CONCLUSION

We do not believe that the need for a royalty tax, compulsory licensing and interference into the free market have been demonstrated. Further bureaucracy is not the answer, especially when it is accompanied with substantial reporting requirements, expensive hearings and an undefined but certainly burdensome tax on industry and the consumer.

We believe this Committee should have a clearer view of the nature of audio taping and the extent of any harm therefrom before it considers proposing an audio royalty. We believe, therefore, that the record should be left open for a period of time sufficient for the submission of additional evidence and analysis on audio.

This time is needed for manufacturers of audio recorders and blank tapes to look very closely at the data on home audio taping. These manufacturers are not the ones who infringe any copyrights with their equipment, which also has a large number of long-recognized and valuable noninfringing uses. Thus, manufacturers have very legitimate concerns about having a tax imposed on their output that will alter their patterns of sale and directions of future development to compensate for activities for which they are not responsible.

This need for additional time to respond on the audio issue is complicated, however, by the current linkage of audio and video royalty proposals. Delay in considering the video issue is entirely unwarranted. Proposals for audio and video royalties involve different economic issues. There are differences in the pattern of use of music versus video product, in the way copyrighted materials is made available to the public both over the air and through other distribution techniques, and even in the structure of the copyrights themselves.

Though the audio industry has submitted several impact studies, these studies do not conclusively show the nature and extent of any harm from audio recording. The motion picture industry made no showing of harm from home video recording in the Betamax litigation; and, in subsequent legislative hearings, it has to date relied only on speculation and conjecture. Opponents of a video compulsory license have conclusively demonstrated not only an absence of harm but actual positive benefits from home video recording.

There are also differences in the legal background oof the audio and video home recording issues. There is a current need to clarify that home video recording is exempt from copyright liability because of uncertainty resulting from the pending litigation. However, there is no such need in the case of audio recording. Until recently, home audio taping has been regarded even by the recording industry as not an infringing activity. In response to the record industry's current position, Chairman Kastenmeier recently reflected that 30 to 40 million Americans who had been producing billions of recordings over the years would be chagrined to learn that they were copyright infringers.

For all these reasons, proposals for copyright royalties in the audio and video fields should be placed, we believe, on separate schedules for legislative action and should otherwise be dealt with independently.

We urge this Committee, before it takes any action on the audio issue, to examine carefully whether the problems of the record companies stem from the recession, piracy, and changes in demographics, preferences, and technology. We ask this Congress to recognize, as it did in the past, that home audio taping for noncommercial purposes is not a copyright infringement and is not an area in which Congress should impose a bureaucratic burden.

Thank you, Mr. Chairman.

REPLY OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA TO THE STATEMENT OF THE ELECTRONIC INDUSTRIES ASSOCIATION BEFORE THE SENATE JUDICIARY COMMITTEE ON THE PROBLEM OF AUDIO TAPING

At the April 21, 1982 hearing of the Senate Judiciary Committee on the problems of audio and video taping, Mr. Jack Wayman testified on behalf of the Electronic Industries Association (EIA) in opposition to the "audio" provisions of the Mathias Amendment (No. 1333) to S.1758. The EIA statement warrants a reply because it (i) entirely ignored the fundamental copyright principles that are at the heart of the audio taping controversy; (ii) misstated the present legal status of audio taping; (iii) obfuscated the direct and substantial economic harm caused by audio taping to the recording industry and those whose livelihoods depend on that industry; and (iv) erroneously claimed that there is no workable legislative solution to the audio taping problem.

At the outset of its statement, the EIA suggested (at p. 4) that before this Committee acts on the audio taping problem it obtain "satisfactory answers" to three questions: (1) is the recent sharp decline in record sales caused by or merely coincidental to audio taping? (2) is the magnitude of harm caused by audio taping sufficient to warrant Congressional action? and (3) would the legislative solution proposed by Senator Mathias and others work in practice?

The answers to these questions, RIAA submits, are clear from the record compiled by the Committee. In sum:

> (1) While many factors affect the economic health of the record industry -- or any other industry -- the economic analyses and consumer surveys submitted to the Committee by RIAA and others clearly and irrefutably show that home taping alone causes lost record sales of approximately $1 billion annually, an amount equal to almost one-third of the industry's actual sales in 1981.
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> (2) Harm of this magnitude surely justifies Congressional action, particularly given the important copyright principles that are at stake.
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> (3) The proposed remedy to the audio taping problem, a mechanism for providing a fair and reasonable royalty to be administered by the Copyright Royalty Tribunal, is practical and time-tested.

Before responding in detail to the questions posited and comments made in the EIA statement, we shall address the important omission in its statement -- namely, the constitutional copyright principles that protect intellectual property.

1. The Copyright Principles Ignored by the EIA Statement.

The EIA statement -- purportedly "on copyright aspects of audio cassette recorders and blank tapes" (at p. 1) -- in fact ignored the copyright principles that are at issue in the audio taping controversy. The EIA did not and cannot reconcile the widespread practice of uncompensated audio taping with the fundamental copyright principle that the payment of royalties for the use of creative property is the only method by which the creator is rewarded and provided an incentive to future creativity. That principle, derived from the Constitution, serves the interests of both copyright owners and the public.

The EIA did concede (at p. 13) that "some people tape records and some sales are lost." That concession is fundamental and indisputable. In displacing sales of records and pre-recorded tapes, home taping strikes at the heart of the copyright system. Record-makers are compensated for the use of their copyrights exclusively from the sale of records -- that is their only source of revenue. These creators of music receive nothing when their creative properties are taken through taping. Taping thus deprives creators and copyright owners of the rewards that fundamental copyright principles mandate should be received and diminishes the creators' incentive to invest further time, effort, money and imagination in the high-risk music industry.

In essence, the manufacturers of blank tape and taping equipment have found a way to siphon income from copyright owners to themselves. It must be kept in mind, however, that the taping industry itself depends for its existence on the recording and music industries and the music they make available to the public. Without that music there would be no taping industry. It is unfair for the taping industry to profit from the efforts of thousands of American creators and copyright owners without compensating them for their investments in the music that is captured on blank tapes.

We turn now to the points that the EIA did make in its statement to the Committee.

2. EIA's Contention That Audio Tape Recordings of Copyrighted Materials, When Intended for Private Non-Commercial Use, Do Not Constitute Copyright Infringement.

The EIA contended (at p. 3) that the present Copyright Act contains an exemption for home audio taping. That contention is refuted by the detailed legal studies prepared by America's preeminent copyright scholar, UCLA Law School Professor Melville B. Nimmer, and by former General Counsel of the Copyright Office, Mr. Jon Baumgarten. As Professor Nimmer concluded, "[t]here is not and never has been an exemption from copyright liability for home audio recording." If there were any such exemption, one would expect it to be obvious from the copyright law or its legislative history. But the Copyright Act of 1976 contains no exemption for home audio taping. And the legislative history of the 1976 Act is devoid of any reference to a home taping exemption. Nor did the 1971 "anti-piracy amendment" *sub silentio* create an implied home taping exemption, as is demonstrated in the Nimmer and Baumgarten studies. But even if it were assumed -- as apparently the EIA does -- that the legislative history of the 1971 Sound Recording Amendment established an implied exemption for home audio taping, any such exemption was not carried over into the general revision of copyright law as embodied in the Copyright Act of 1976. (These points are set forth in greater detail at pp. 26-34 of RIAA's principal submission, Appendix Seven thereto and the testimony of Mr. Jon Baumgarten.)

Finally, quite aside from any debate as to what Congress did or did not intend in 1971 and 1976, the record and music communities are now asking for Congress' help in view of the devastating impact of audio taping today. Congress has the power to amend the Copyright Act to keep pace with new technologies -- a power Congress has regularly exercised.[1] Here, Congress should exercise that power to accommodate the interests of copyright owners, the public and the taping industry.

3. EIA's Contention That Record Sales Are Declining for Reasons in Addition to Home Taping.

The EIA conceded (at p. 13), as it must, that record sales are declining and that taping does replace sales. The EIA argued, however, that factors in addition to home audio taping may have significantly contributed to the sharp decline in record sales.

A variety of factors undoubtedly affect the economic health of the record industry; nevertheless, the economic analysis submitted to the Committee by Dr. Alan Greenspan shows clearly that audio taping alone results in lost record sales of approximately $1 billion annually. That analysis is further supported by the two recent Warner Communications Inc. ("WCI") Home Taping Surveys.[2] The first WCI survey found that, in 1980, tapers copied 251 million record albums and over 2 billion individual selections; and the second WCI survey found that 40% of the complete albums and 35% of the selections would have been purchased were home taping not possible. Thus, the two WCI surveys found that lost record sales exceeded $1 billion in 1980.

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[1] See generally the Statement of Mr. David Ladd, Register of Copyrights, before this Committee, April 21, 1982.

The harm caused by home audio taping is clear. For the sake of completeness, however, we shall address seriatim the other economic ills identified by the EIA:

(a) The Recession. The EIA claimed (at pp. 4-5) that the recent recession has caused the decline in record sales and that this is demonstrated by the allegedly greater decline in sales of so-called "audio components" (in truth, audio playback equipment only). Put another way, the EIA suggested that the demand for music in general has been reduced. These contentions are just plain wrong.

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[2] M. Fishbein, S. Middlestadt and M. Kapp, "A Consumer Survey: Home Taping" ("WCI Home Taping Survey"), WCI, March 1982; M. Fishbein and S. Middlestadt, "1981 Estimate of Loss Due to Home Taping: Tapers' Reports of Replacement" ("WCI Loss Report"), WCI, April 1982.

First, from 1979 to 1981, record unit sales declined 17% (not 8.7% as suggested by the EIA) and unit sales of both records and pre-recorded tapes declined 13% -- levels which vastly exceeded the national economic decline and which simply cannot be attributed to the recession. In contrast, and despite the recession, shipments of audio tape recorders increased 39% from 1979 to 1981, a fact Mr. Wayman failed to mention. Similarly, blank tape sales, whether measured in units or amount of playing time, have continued to increase since 1979. Indeed, in the past decade, blank tape sales, in terms of playing time, have increased more than 400%. (*See* Greenspan Testimony, Tables 1, 3.)

Second, contrary to the implication of the EIA's argument, overall consumption of music -- from both record sales and taping -- has remained relatively constant in recent years. Overall music demand has not fallen off significantly; all that has changed in recent years is the mix of music sources as between pre-recorded discs and tapes, on the one hand, and home-recorded blank tapes on the other. (Greenspan Testimony, Table 3.) Specifically, the proportion of music obtained by taping has steadily increased from 20% of the total hours of recorded music available in 1972 to 42% of the total hours available in 1981. (Greenspan Testimony, p. 4 and Table 3.)

(b) Changing Demographics. The EIA next argued (at p. 5) that record sales are declining because the growth rate of the 15 to 24 year old population has declined in the past decade. This argument fails because it is premised on the myth that teenagers purchase the most records. That simply is not true, and has not been for some years. In fact, most record purchases are by young adults (20-34 years of age) according to a 1978 WCI research report.[3] With the accelerated rate of growth of that group in the past decade, one would have anticipated an increase in record sales. Instead, sales of records have declined sharply, while taping has exploded.

(c) Less Available Talent. The EIA also blamed (at pp. 5-6) the decline in record sales on an alleged dearth of "super-stars" or "blockbuster" albums with broad-based appeal. But there is no lack of stars or "hit" albums. The fact is that total music consumption has grown in the past decade. (Greenspan Testimony, Table 3.)

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[3] Mr. Kapp and M. Fishbein, "The Prerecorded Music Market: An Industry Survey," WCI, March 1978, at pp. 9-10; see also M. Kapp. S. Middlestadt and M. Fishbein, "The Prerecorded Music Market: A Consumer Survey -- 1980," WCI, April 1981, at p. 14.

The statement of Mr. Jerry Moss, Chairman of A&M Records, demonstrates the effect of taping on the sales of best-selling "hit" albums.[*] According to Mr. Moss, an A&M production which won the award for the best-selling-album in 1976 sold almost 7 million copies. A&M won the award again in 1979 with an album that sold just over 4 million copies. In contrast, in 1982, another "hot" A&M recording has been at the top of the Billboard album chart for the same length of time as was its 1979 hit -- but has sold less than 1.7 million units.

The alleged lack of hits has certainly not inhibited the growth of taping or the overall consumption of music. It is not a dearth of hits, but the taping of those hits, that is hurting the record industry.

(d) "Fragmented" Music Interests. The EIA also suggested (at p. 6) that tastes in music have become "fragmented," that teenagers now have "specialized interests" in music and that specialized radio stations are catering to their narrow ranges of taste. This contention reflects a misunderstanding of the music industry. Apart from the facts that record-buying and taping are greater among non-teenagers than teenagers,[5] what occurs in the industry is that sales of well-established "mainstream" artists (e.g., Barry Manilow, Barbra Streisand, John Denver) are always mixed with growing sales of new artists and new music forms. The Beatles, for example, were considered a "fragment" type of music before they achieved more broad-based appeal. Finally, the EIA's so-called "fragmentation" of taste argument, even were it valid, cannot explain the dramatic shift from record buying to taping in the past decade and the concomitant increase (from 20% to 42%) in taping as a source of musical entertainment.

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[*] Testimony of Mr. Jerry Moss Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, April 14, 1982, at pp. 3-4. (Mr. Moss' statement has been submitted to and is a part of the record of this Committee.)

a. Record and Tape Quality. The EIA conjectured (at pp. 7-8) that taping has increased because of the poor quality or unavailability of records and pre-recorded tapes. These are not, however, significant reasons for taping. The rate of records returned as defective to Warner Communications' record companies, for example, has been just 4% over the years -- far below the 15-40% numbers claimed by the EIA. As to the alleged unavailability of pre-recorded tapes, industry practice today is to release the tape simultaneously with the release of the record or at most a few days later.

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[5] Contrary to a popular misconception, most taping -- 88 percent -- is done by persons over the age of 20 who generally are in the middle and upper income brackets.

Moreover, the Warner consumer research study submitted to the Committee clearly demonstrates that the predominant motive for taping is to avoid purchasing. In contrast, only 7% of the survey respondents indicated that they tape most often because a pre-recorded tape is not available, only 3% to get better quality than on pre-recorded tapes and only 2% to get better quality than on records. (WCI Home Taping Survey, pp. 16-17.)

(f) Piracy and Counterfeiting. The EIA stated (at p. 8) that piracy and counterfeiting are hurting the record industry. That is true. But resolving the problem of piracy and counterfeiting and resolving the problem of home audio taping are not mutually exclusive. And taping remains the record industry's major problem. While the RIAA estimates the retail value of counterfeited records at several hundred million per year, the effects of home audio taping cost the recording industry approximately $1 billion each year, according to Dr. Greenspan and the WCI surveys.

(g) Video Games and Computers. The EIA speculated (at p. 8) that competition from video games and computers may have caused the decline in records sales. But there have always been other leisure-time activities competing with records for the consumer dollar. If there were less interest now in recorded music than in the past, taping should also be declining. But it is not. Blank tape sales have increased. Tape recorder sales have grown dramatically -- despite increased interest in video games and other new technologies. And, overall consumption of music has remained relatively stable. The percentage of music obtained from taping instead of buying, however, has doubled in the last decade. (Greenspan Testimony, Table 3.)

Unlike the speculative impact of video games, the causal relationship between taping and lost record sales has been demonstrated beyond question.

(h) Pre-Recorded Tape Sales. The EIA pointed out (at pp. 9-10) that from 1979 to 1981, sales of pre-recorded tapes grew while record disc sales fell. That is true. But it is also irrelevant. At issue is the relationship between audio taping and the sales of pre-recorded music, not the ratio of disc sales to pre-recorded tape sales. Home taping is displacing sales of both records and pre-recorded tapes and, in that way, undermining the value of the copyrights in music. That is the critical fact and it is not seriously contested by the opponents of the Mathias Amendment.

(i) The Success of One Record Company. The EIA pointed out (at p. 10) that MCA Records' profits from records increased last year, apparently suggesting that the entire record industry is prospering. That is false. MCA is a relatively small record company whose recent experience is atypical of the industry. Its profit trend is up because of its great emphasis on sales of reissued albums rather than new releases. Moreover, recent reports indicate declines in domestic sales and profits throughout the entire record industry. *See*, *e.g.*, *Billboard*, April 24, 1982, p. 9 ("WCI Music Revenues Down"; "$$ Decline For CBS Records"); *Billboard*, April 17, 1982, p. 3 (record releases declined 18% in 1981). Overall, manufacturers' net shipments declined from $4.13 billion to $3.6 billion between 1978 and 1981. And releases of new albums were down by nearly one-third. That means fewer choices of music for the public -- just the opposite of the constitutional goal of copyright protection.

In sum, the additional factors identified by the EIA in its attempt to divert attention from the issue at hand do not even begin to approach home audio taping in terms of economic impact on the musical arts community. And, contrary to the EIA's assertions, the devastating impact of taping is clear.

4. EIA's Contention That the Precise Economic Impact of Audio Home Taping Is Uncertain.

The EIA raised several questions (at pp. 10-12) about Dr. Greenspan's economic analysis and record industry home taping research. In this connection, it should be noted that the data and methodology underlying Dr. Greenspan's conclusions have been submitted to the Committee. RIAA is confident that they will withstand the most exacting scrutiny.

In addition, the EIA complained that the industry's home taping studies are "fundamentally flawed" because they did not quantify the different "purposes" of taping (such as recording off-the-air, preserving records, making "customized" tapes and taping borrowed records). But the real issue is not the purpose of taping; rather, it is the extent to which taping displaces sales of pre-recorded music. In this connection, RIAA has submitted a recently completed WCI research study which further supports Dr. Greenspan's conclusion that approximately 40% of taping replaces sales of records -- causing a loss of $1 billion in record sales annually. Thus, there is in fact no merit to the EIA's efforts to minimize the debilitating impact of taping on record sales and releases.

The EIA also pointed out that 45% of the $2.85 million in taped music consists of "customized" albums (of 10 separate selections) which were not available for sale as such. The EIA questions whether any of that music would have been bought if it could not have been taped. But as the WCI Loss Report shows, 35% of those taping individual selections report that, had taping been impossible, the tapers would have purchased the single record or the album containing the selection (WCI Loss Report, pp. 6, 8). Moreover, WCI placed an extremely conservative valuation on the individual selections that were taped.[6]

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[6] Specifically, in the absence of home taping, tapers would have had to purchase either the single record or the album (at $6.27) containing each selection. In valuing the selections, however, WCI treated every 10 selections as if they constituted only a single "selection" album. (See WCI Home Taping Survey, p. 24.)

5. EIA's Contention That the Proposed Remedy Might Not Work.

Finally, the EIA suggests that Congress is helpless to find a reasonable remedy to deal with the audio taping problem. That suggestion should be rejected.

The EIA argued that some tapes are not used to infringe copyrighted music and, hence, no tapes should be subject to a royalty. In fact, 75% of all tapes are used for infringing purposes.[7] (WCI Home Taping Survey, p. 9.) Congress and the Copyright Royalty Tribunal can surely deal with the minority of tapes not suitable, or commonly used, for infringing copyrighted records and music. Indeed, the Mathias amendment was drafted to give the Copyright Royalty Tribunal and the EIA members themselves sufficient flexibility to deal with the minority of tapes not used to infringe copyrighted records and music. For example, most equipment and tapes used for non-infringing purposes, such as office dictation, are of lower quality, fall in lower price categories or (in the case of tapes) provide shorter recording time than those used by music tapers. The CRT might conclude that such equipment and tapes should be exempt from royalties. Moreover, because the royalty is to be levied on the manufacturers and importers of the equipment and blank tape (i.e. the EIA's members or companies affiliated with them), these companies can decide how to adjust their pricing structures selectively, limiting royalties primarily to those machines and tapes most suitable for recording music. In the final analysis, the fact that a small percentage of tapes and equipment is used for non-infringing purposes is surely not a reason to withhold royalties on the vast majority of tapes that are used to duplicate copyrighted material.

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[7] The EIA claimed (p. 14) that WCI's research inconsistently shows 75%, and then 66%, of taping is of music. That is false. The WCI Survey shows that 75% of all tapes are used to record music (WCI Home Taping Survey, p. 9), whereas tapers spend only 66% of their taping time making copies of music (id., p. 12). The difference in the two figures, and the reasons why the 75% figure is the relevant one, are explained by the WCI Survey (id., p. 12).

Second, the EIA has attempted to distract attention from the harm to the creative music community caused by uncompensated home taping by impugning the ability of the Copyright Royalty Tribunal. The EIA's attack is unwarranted.

The CRT was established by Congress under the 1976 Copyright Act, and in light of new technological developments, to determine, adjust and distribute certain royalty rates and fees. Although a new agency, the

CRT is a competent and cautious body and the most appropriate one to determine and distribute the royalties payable for home taping of copyrighted audio and video works.

In 1981, Congress asked the General Accounting Office (GAO) to review the CRT's record and to report as to whether it was performing its functions adequately. Significantly, the GAO concluded that, not only had the CRT performed its mandate, but that it "is now generally recognized by the affected interests as a competent body . . . ." While noting that the CRT was operating under organizational limitations not imposed on other federal agencies (such as lack of a general counsel, access to expert economic advice and a subpoena power), the GAO found that "[i]t has followed acceptable procedures and has made the distributions required to date."

The GAO report also noted that some of the CRT's early decisions had been challenged in the courts. However, it acknowledged that "this almost always occurs when an independent body makes precedent setting rules." In fact, since the GAO report was issued, the CRT's first three initial decisions -- the 1978 cable television distribution, the jukebox proceeding and its mechanical rate proceeding -- have been upheld by federal courts of appeal.

No one claims that the CRT is perfect. Nor was the Federal Communications Commission -- or any other agency -- in its infancy. The important point, however, is that -- in the words of the GAO -- "[the CRT] has done what it was mandated to do."

CONCLUSION

The EIA's position before this Committee is fundamentally flawed by its failure to recognize the basic copyright principles that are at issue. By displacing sales of pre-recorded music, home audio taping deprives copyright owners of their fair rewards and diminishes their incentive to invest time, effort, money and imagination in the high-risk recording industry. That means lost income; but it also means less music for all Americans to enjoy. Copyright law must keep pace with the new technologies that have permitted an explosion in home audio taping.

The EIA asks this Committee to delay any decision on audio taping so that it can review the facts. But the audio home taping problem has been studied here and abroad for a number of years by all parties to the controversy. Meanwhile, the plight of the record and music communities grows worse and worse, with lost sales of $1 billion per year and record releases down by a third in the past three years. The day of legislative reckoning should not be delayed while millions more blank audio tapes are sold without any compensation to the American creative talent whose works are copied on those tapes.

Congress has all of the data it needs to act. The need for a fair and prompt legislative solution is apparent. We strongly urge Congress to enact the Mathias Amendment.

May 11, 1982

ADDENDUM TO THE RIAA REPLY TO THE EIA COMMENTS ON HOME AUDIO TAPING

On May 14, 1982, the Electronic Industries Association submitted additional comments to the Senate Judiciary Committee. EIA's comments warrant this additional reply because they are designed to obfuscate further the direct and substantial harm caused by audio home taping and the available solutions to that harm.

It should be noted preliminarily that EIA has once again ignored entirely the fundamental fact that what is at issue in this debate is the use and reproduction of copyrighted creative works without any compensation whatsoever to the owners of the copyrights in those works. As RIAA noted in its principal rebuttal of EIA's comments, home taping undermines the very purpose of copyright -- to provide payment for the use of creative properties as a reward for the creator's labor and an incentive to future creativity. Uncompensated home taping displaces sales of pre-recorded music and thus deprives creators and copyright owners of the rewards they should receive and diminishes their incentive to future creativity. EIA's silence on this most basic issue speaks much louder than does its recent arguments.

EIA's most recent arguments fall into two categories. First, EIA charges that there are "problems" with RIAA's estimates of the extent of the damage caused by audio home taping (although it does not attempt to dispute the essential fact that substantial and growing damage is occurring). Second, EIA once more contends that, whatever the damage might be, there are "problems with the proposed remedy [to home taping]." As is demonstrated below, neither of these complaints has merit and neither negates the compelling case that has been made for the enactment of Amendment No. 1333 to S. 1758.

I. EIA'S CONTENTION THAT THERE ARE "PROBLEMS WITH THE RIAA ESTIMATES OF DAMAGE"

Significantly, EIA does not dispute the fact that audio home taping harms the recording industry and the creators of America's music. Nor does it recant its earlier concession that "some people tape records and some [record] sales are [thereby] lost." (EIA statement of April 21, 1982 at 13.) Instead, EIA argues, in effect, that no Congressional action on the home taping problem is necessary because they claim that the precise extent of that harm is in dispute. RIAA stands by its earlier estimates -- and that of Dr. Alan Greenspan -- that audio home taping results in lost record sales of almost $1 billion annually. But even accepting EIA's own figures on the extent of audio home taping, the harm it is causing clearly requires a Congressional response.

EIA claims that RIAA's estimate of the damage caused by home taping may be in error because it is based largely on Warner Communications' first consumer survey and "the people interviewed in the Warner survey may have exaggerated [about how much audio taping they do]." (P. 2.) EIA's speculation is based on its claim that the Warner survey respondents reported more purchases of blank audio tape than there were factory sales of blank tape. Several points should be borne in mind in assessing EIA's claim of exaggeration.

First, the Warner survey measured _actual consumer purchases_ of blank tape. The figures relied on by EIA purport only to show _factory shipments_ of blank tape. But consumer purchases can be higher than shipments because consumers buy from dealer inventories. This is especially true in the case of 8-track tapes (where EIA finds a significant disparity), which manufacturers are phasing out but which dealers still have in large supply and are continuing to sell to the public.

Second, even if EIA were correct in asserting that there is 20% less taping than the Warner study indicates, then all that it has demonstrated is that home taping may be causing lost record sales of about $700-800 million annually rather than $900 million -$1 billion. Thus, even accepting fully EIA's criticism of RIAA's damage estimate, the demonstrated harm to the recording industry caused by home taping is severe.

At bottom, EIA does not challenge the fact that home taping causes severe economic harm to the recording industry; rather, it is simply nitpicking the precise extent of that harm. In any event, under the Home Recording Act of 1982, the Copyright Royalty Tribunal will assess the extent of the harm caused by home taping in the course of the evidentiary proceeding it will conduct to set appropriate royalty rates.

EIA also challenges the economic analysis of home audio taping prepared by Dr. Alan Greenspan. EIA's criticism is based on the arguments that Dr. Greenspan gave no direct consideration to the "evidence" that (i) nearly half of all taping is of selections rather than albums, (ii) nearly half of all tape players are portable or in cars so that records are not a substitute for tapes, (iii) many titles are not available on pre-recorded tapes and (iv) home taping "can increase sales of recorded music." (Pp. 4-5.) None of these arguments detract from Dr. Greenspan's conclusions.

First, the second Warner Communications survey submitted to the Committee demonstrates that 35 percent of all selections that are taped would have been bought had taping not been possible. This figure is entirely consistent with Dr. Greenspan's estimate of the displacement of record and pre-recorded tape sales caused by home taping. Moreover, as indicated on page 24 of its survey, Warner used a very conservative approach in determining the total dollar value of sales displaced by the taping of single selections. Certainly in many cases the sale that would have occurred but for home taping is of an entire album notwithstanding the fact that only a single hit song from that album is taped. Warner did not count the entire sale price of such an album as lost; rather, it grouped the individual selections taped into album equivalents (10 single tapings as the equivalent of one album) and thus counted only one lost album sale for each ten selections taped.

Second, the portability of tape players is irrelevant. The recording industry sells both records and pre-recorded tapes. While records are obviously not always a substitute for blank tapes, pre-recorded tapes are certainly a substitute for blank tapes. Thus home taping displaces sales of our pre-recorded cassettes as well as records.

Third, EIA's claim that many titles are not available on pre-recorded tapes is just false. The fact is that pre-recorded tapes are available for virtually all domestic current releases. And, in any event, the first Warner survey found that very few people -- 7 percent to be exact -- claim that the reason they tape most often is the unavailability of pre-recorded tapes. Not surprisingly, on the other hand, the principal reason given for taping music is to avoid buying records or pre-recorded tapes.

Fourth and finally, EIA speculates that home taping can increase sales of recorded music because "some recorded music taped at home will have been bought in order to be taped." (p. 5.) There is no evidence, however, that taping stimulates record buying. Rather, taping and buying are alternate ways of acquiring music. If taping were not possible, tapers would spend even more for pre-recorded music quite simply because tapers are those most interested in music generally.

II. EIA'S CONTENTION THAT THERE ARE PROBLEMS WITH THE PROPOSED REMEDY TO HOME AUDIO TAPING

EIA argues that the proposed remedy [Amendment No. 1333 to S.1758] to home audio taping is inappropriate because (i) tapers who never tape copyrighted material will nonetheless pay royalties; (ii) determination of the royalty rate will be difficult; (iii) the royalty system will face significant enforcement problems; and (iv) distribution of the collected royalties will be difficult. (Pp. 8-16.)

EIA's initial argument, in essence, is that because some blank audio tapes and recording equipment are not used to infringe copyrighted music, no tapes or equipment should be subject to such a royalty levy. This argument should be rejected.

First, the fact that some blank tapes and equipment are not used for infringing purposes scarcely justifies ignoring the proven and severe economic harm caused by unauthorized taping of copyrighted musical recordings -- the use to which the vast majority of blank tapes (75 percent) are put. And, indeed, the taping industry is marketing its products -- as demonstrated by the attached advertisement -- for the express purpose of copying our music.

Second, the proper approach to noninfringing uses is to exempt from the royalty requirement, or permit royalty adjustments for, those tapes and equipment which will not be used to copy music. That is precisely the approach already contained in Amendment No. 1333 to S. 1758.

Thus, under that Amendment, the Copyright Royalty Tribunal would be authorized to exempt from royalties entirely those tapes or equipment which are not suitable for recording music, based, for example, upon quality, price, length of recording time (in the case of tape) or other appropriate criteria. Alternatively, the Tribunal could adjust the amount of the royalty to take into account the extent to which the tape or equipment is not used for infringing purposes.

Third, because the royalty is payable by importers and manufacturers of tape and equipment (rather than purchasers), those companies can adjust their pricing structures selectively and limit the imposition of the royalty to those types of tape and equipment most suitable for recording music.

In the final analysis, there may be a small percentage of tapes and equipment that are subject to royalties but are never used for infringing purposes. By the same token, there undoubtedly will be tapes and equipment that are not subject to royalties but are used to record music and infringe copyrights. Overall, however, royalties would be levied where they should be -- on the manufacturers and importers of the tape and equipment that are causing a loss of sales of almost a billion dollars a year to the music and recording industries.

EIA also argues that the determination of the royalty rate will be very difficult. This argument is little more than makeweight. The royalty fees are intended to afford copyright owners "fair compensation" for home audio taping of their works. The royalty rate would be determined by the Copyright Royalty Tribunal pursuant to a full evidentiary proceeding. An initial proceeding would be commenced within 30 days after the effective date of the legislation and subsequent proceedings to adjust the rate could be held in 1985 and at five-year intervals thereafter.

EIA also argues that collection of the royalty might pose significant enforcement problems. It asserts, for example, that some tape manufacturers might fill tapes designed for home taping with pre-recorded material in order to avoid making royalty payments or that a black market for blank tapes might develop. In fact, however, Amendment No. 1333 already contemplates these problems and includes appropriate enforcement provisions. In any event, the fact that some tape manufacturers and sellers might attempt to violate the law is certainly not a rational basis for failing to pass a law the merits of which have been so thoroughly documented.

EIA's next argument is that distribution of the royalty will be difficult. RIAA appreciates EIA's concern, but the fact is that private market mechanisms (e.g., ASCAP, BMI, etc.) already exist for facilitating the distribution of copyright royalties. Significantly, without exception, all interested parties who would be on the receiving end of the distribution mechanism contemplated by Amendment No. 1333 and who thus have standing to raise this point are in full support of the Amendment.

Finally, EIA suggests that record companies negotiate with radio stations to control broadcasts that lend themselves to home taping. This proposition reflects a basic misunderstanding of the copyright law. Record companies have no performance right under copyright law and thus have no basis for bargaining with broadcasters to control home taping or to receive compensation from radio stations. In any event, this proposal entirely ignores the fact that a large part of the home taping problem involves the taping of borrowed records.

CONCLUSION

The EIA's position before the Committee remains fundamentally flawed. EIA has not seriously disputed the fact that home taping is causing substantial economic harm to the recording and music industries. Nor has it proffered any credible arguments that the solution to the home taping problem proposed by Senator Mathias and others is inadequate or unworkable.

The urgent need for enactment of the Mathias amendment has been clearly demonstrated. The Committee should act on that proposal at the earliest possible moment.

June 18, 1982

Senator **Mathias**. Mr. Eizenstat.

Mr. **Eizenstat**. Mr. Chairman, thank you. I appreciate the opportunity to testify with my client.

We will discuss an issue, Mr. Chairman, which is totally distinct and totally separate from those which have been discussed today; was not mentioned at all during Mr. Valenti's testimony, and is an issue which, respectfully, does not belong in this bill or any amendment to it because it is an issue which is irrelevant to the basic concerns which have been expressed by the movie industry, or the counter arguments by the VCR industry on the royalty matter. Yet, it is an issue which will directly imperil the survival of 25,000 small businesses in the video cassette rental business who have created a new market for the movie industry which did not exist only a few years ago.

That issue, Mr. Chairman, is the repeal of the first sale doctrine for the video industry, and the statutory creation, under section 5, of what in effect is a vertical monopoly for the movie industry, when that industry has the full opportunity now to control the cassettes that it itself has created through the operation of the marketplace. Mr. Cooper will present a summary of our testimony. He is a small businessman and chairman of the Committee Against Regulation of Video Enterprises.

Senator **Mathias**. Mr. Cooper.

Mr. **Cooper**. Thank you, Mr. Chairman.

Mr. Chairman, I am here today to oppose section 5 of your amendment. Section 5 will create a congressionally mandated vertical monopoly of the movie industry, substitute congressionally approved regulation for the free market, and imperil the independent video retail industry.

The first sale aspect of the video recording controversy has thus far received relatively little public attention. The first sale doctrine has served the Nation's interest well. Put simply, the repeal of the first sale provisions would legislatively create for the large motion picture companies a statutory vertical monopoly over the distribution of their films to the home movie viewer and would literally imperil the independent video cassette industry and its 75,000 workers. We believe that such vertical monopoly legislation is totally inconsistent with the purposes of the copyright laws and clearly contrary to the interests of the millions of American motion picture enthusiasts.

Unlike the film industry, our industry, Mr. Chairman, is just 4 years old. The number of video outlets in the past 4 years has risen from zero to 25,000. It has created 75,000 jobs. We believe this is imperiled by this legislation.

Video cassette retailers both sell and rent movies which have been recorded by the motion picture companies themselves on tape cassettes and discs.

At the same time, by assuming the risk of stocking the wide variety of movies of potential interest to their rental customers, the video cassette retailers have provided virtually the only marketplace for the sales of this motion picture product.

Some motion picture companies, however, apparently are not satisfied. In the name of "providing incentives for the creation of intellectual property," these companies now want Congress to give them a legal monopoly over every stage of the movie industry, from production through distribution and retailing. In particular, they want a legal monopoly over cassette rentals, curtailing the rentals themselves, and thereby threatening the viability of the thousands of independent retail cassette businesses in the United States that have already been formed and the continuation of low rental prices of cassettes to consumers. How can such a preposterous result be justified?

One contention offered, Mr. Chairman, is that the rental of cassettes by independent cassette retailers has somehow deprived the movie companies of copyright royalties they truly deserve. We believe this argument to be groundless. It overlooks the fundamental fact that the motion picture companies already have the power to control the distribution of their cassettes through the market. If members of the movie industry choose to sell their cassettes directly or through distributors to home retailers, they can charge as much for the cassettes as the market will bear. Indeed, some companies already are trying through the marketplace—an appropriate forum—to fully control these cassettes. Companies like MGM, Warner Bros., and 20th Century Fox currently permit only the rental of certain titles such as "Rocky," "Superman," "Body Heat," just to name a few. Warner, in fact, prohibits the sale of any of its films in this category in perpetuity.

Similarly, Mr. Chairman, the motion picture companies directly control the royalties they earn from their cassettes through their sale and rental charges. The rental-only policy now in effect by these companies puts a far greater price on the product to the retailer and yields him a far lesser return. It is costing us somewhere in the neighborhood of $185 per film as compared to $65 before these rental programs began.

The motion picture industry now has it within its power to use the marketplace to increase its revenues still further—without a congressional grant of vertical monopoly—by simply charging more for the sale of its cassettes or by fully adopting the "rental only" policy it has now begun.

Tape cassettes were created and have now been produced and marketed by the motion picture studios. These cassettes, in turn, are being used by consumers precisely in the manner that the motion picture industry has always intended them to be used—by consumers watching them at home. There is no evidence, Mr. Chairman, and no evidence has been presented to this committee, of any large numbers of consumers renting these tapes for the purpose of copying the movies. In contrast to a sound recording, which can be recorded for as little as $1 or less, the copying of video cassettes costs upwards of $25, and that is not including the addition of $700 to buy a second video recording machine.

In short, any allegation that independent video rental dealers have significantly cut into cassette sales is a red herring. Just the opposite is the case, since the independent retailers provide virtually the only market for the cassettes.

Unlike the recording industry, in which the issue of the record is the exclusive source of revenue, the movie industry earns revenue in four stages—first, from theater display, then from cable TV, then from network TV, and finally, from cassette and disc sales.

We occupy even a lower rung on the ladder than paperback books in the two tiers of the book industry. We should not abandon the first sales doctrine for books, and we should also not abandon that doctrine for movies.

In sum, the proposed repeal of the first sale doctrine should be recognized for what it is: A backdoor method for allowing the large motion picture companies to obtain monopolistic power over the video cassette industry and to ruin the life savings of the 25,000 video cassette retailers who have taken the risk and established the success of that industry. Giving the movie companies a vertical monopoly would be like giving the oil industry a congressionally mandated monopoly over the production, refining, and marketing of crude oil. None of the companies in these industries can control the rentals of their products after they are sold, and if they tried, the marketplace would be the author of their success.

Similarly, the movie industry has the existing opportunity in the marketplace to enter every phase of the video cassette industry. Motion picture companies can establish their own distributorships, set their own prices for sales of their cassettes, or refuse to sell at all.

Indeed, Mr. Chairman, the motion picture industry has recently acknowledged that it is pursuing the market approach by incorporating the copyright royalty in the charges it makes for these cassettes. Jack Valenti who testified earlier, said it best in Los Angeles at a House hearing of the Judiciary Committee: "Prerecorded cassettes and discs are not part of the compensation being considered in the legislation before you. The copyright fee is included in the purchase price and/or rental charge." That is our same contention, Mr. Chairman. The movie industry already is earning the copyright fees to which it is lawfully entitled on the rental of cassette tapes. It has the power to raise those fees at any time to a level the market will permit. We think the market works, Mr. Chairman. Congress should leave it alone to do its job, and not create a vertical monopoly for the movie industry.

Thank you.

Senator MATHIAS. Thank you very much. We appreciate it. Thank you very much, gentlemen.

[Prepared statement of Elmer Cooper follows:]

TESTIMONY OF
ELMER COOPER, CHAIRMAN, AND STUART EIZENSTAT, COUNSEL
COMMITTEE AGAINST REGULATION OF VIDEO ENTERPRISES

My name is Elmer Cooper and I am Chairman of the Committee Against Regulation of Video Enterprises, an organization representing some of the 25,000 small businesses which rent and sell video cassettes. I am also the owner of Video Supermarket of Washington, D.C. With me is the Counsel to the Committee, Stuart Eizenstat of the law firm of Powell, Goldstein, Frazer & Murphy.

We are here today to express the strong opposition of the retail video cassette industry to that portion of the Mathias Amendment S. 1758, set forth in Section 5 of the bill, that would repeal the "first sale" doctrine as it now applies to motion pictures or other audiovisual works.

Section 5 will create a Congressionally mandated vertical monopoly of the movie industry, substitute Congressionally approved regulation for the free market, and imperil the independent video retail industry.

The "first sale" aspect of the video recording controversy has thus far received relatively little public attention but is of great importance to the video cassette industry. Under this long-standing doctrine, copyright holders of sound recordings and movies (as well as authors of written works) have been given the right under the copyright laws to control or obtain royalties only through the "first sale." Thereafter, purchasers may lawfully resell or rent -- but not reproduce -- the recorded works without copyright liability.

The "first sale" doctrine has served the nation's interest well. It has been a fundamental part of the delicate balance inherent in the nation's copyright laws between promotion of innovative works on the one hand and the interests of the consuming public and the free marketplace on the other. The doctrine has helped to encourage the explosion of creative work in the United States, by providing adequate financial returns to copyright owners. At the same time, it has not stifled the marketplace nor negated the interests of the public by overly extensive control of these works past a reasonable point.

Put simply, the repeal of first sale provisions would legislatively create for the large motion picture companies a statutory vertical monopoly over the distribution of their films to the home movie viewer and would literally imperil the independent video cassette industry and its workers. We believe that such "vertical monopoly legislation" is totally inconsistent with the purposes of the copyright laws and clearly contrary to the interests of the millions of American motion picture enthusiasts.

Unlike the film industry, which is roughly 60 years old, the video cassette industry is brand new. In just four years, the number of video outlets has grown from 0 to 25,000, creating approximately 75,000 jobs. With investments ranging from $50,000 to $200,000 per store, the retail video cassette industry has attracted well over $1 billion in investment funds. All of this has occurred as a direct and immediate result of the decision of the movie industry itself to create another lucrative market for its films -- beyond its primary market in movie theaters and its secondary market in sales to television.

Video cassette retailers both sell and rent movies which have been recorded by the motion picture companies themselves on tape cassettes and disks. The lion's share of the retail cassette business, however, depends on cassette rentals, both because the cassettes themselves are expensive to purchase (they now average about $70 per cassette and considerably more for popular films) and are replayed by home viewers relatively infrequently. Through the rental of movie cassettes, the video retailers have thus helped to provide consumers with a service -- the home display of movies at an affordable price -- that only several years ago was believed to be little more than a "pie-in-the-sky" fantasy. At the same time, by assuming the risk of stocking the wide variety of movies of potential interest to their rental customers, the video cassette retailers have provided virtually the only market for the sales by the motion picture companies of their cassettes, which totaled over $250 million in 1981.

The video cassette recently developed by the motion picture industry, and sold by the industry to video retailers across the country, has made possible the development of a residual market for movies beyond theaters and television. Some motion picture companies, however, apparently still are not satisfied. In the name of "providing incentives for the creation of intellectual property" these companies now want Congress to give them a legal monopoly over every stage of the movie industry -- from production through distribution and retailing. In particular, they want a legal monopoly over cassette rentals, curtailing the rentals themselves, and thereby threatening the viability of the thousands of independent retail cassette businesses in the United States that have already been formed and the continuation of low rental prices of cassettes to consumers.

How can such a preposterous result be justified? One contention offered is that the rental of cassettes by independent cassette retailers has somehow deprived the movie companies of copyright royalties they truly deserve. This argument is groundless. It overlooks the fundamental fact that the motion picture companies already have the power to control the distribution of their cassettes through the market. If members of the movie industry choose to sell their cassettes directly or through distributors to home retailers, they can charge as much for the cassettes as the market will bear. Indeed, some companies are already trying through the marketplace -- an appropriate forum -- to fully control these cassettes, a result the movie industry now seeks to have Congress mandate even if it cannot be achieved through legitimate competitive effort. Thus, as indicated in the attached list, 20th Century Fox, MGM and Warner currently permit only the rental and prohibit the sale of the cassettes of many popular motion pictures -- "Rocky", "Superman II", "Arthur", and "Body Heat", to name a few. In the case of 20th Century and MGM, this restriction is imposed for 6 and 4 months, respectively. Warner prohibits the sale of the films on the attached list in perpetuity.

Similarly, the motion picture companies directly control the royalties they earn on their cassettes through their control over sales prices and rental charges. Tapes that cost less than $20 to produce are sold to distributors at mark-ups well in excess of 100%. For popular movies which are in strong market demand, the mark-ups can easily exceed 200%. This is reflected in the attached price list which indicates that both the distributor and retail cost of different tapes can vary by as much as $30 per tape.

The "Rental Only" policy now being pursued by 20th Century, MGM, Warner and Walt Disney Productions gives the motion picture producers even larger returns -- far larger than any conceivable return that can be earned by the independent video cassette retailer. Under this "rental only" policy, the retailer typically must give the motion picture company a $100 deposit and a monthly rental fee of up to $22 per month on each tape. Simply to break even, the cassette store owner must rent that tape anywhere from 13 to 20 times. On a very good title, this can take 2 to 3 months. Most other titles take 6 months or longer to break even, while some never do. Compared to the enormous mark-ups on these tapes charged by the movie companies, any claims that the independent cassette retailers are taking food out of the mouths of the motion picture industry are absurd.

The motion picture industry now has it within its power to use the marketplace to increase its revenues still further, without a Congressional grant of vertical monopoly, by simply charging more for the sale of its cassettes or by fully adopting the "Rental Only" policy it has now begun.

The total bankruptcy of the motion picture industry's attempt to obtain total control over the cassette rental business becomes even more apparent when it is remembered that, in contrast to video recorders, tape cassettes were created and are now produced and marketed by the motion picture producers themselves. These cassettes, in turn, are being used by consumers precisely in the manner that the motion picture industry has always intended them to be used -- by consumers watching them at home. There is no evidence that large numbers of consumers are renting these tapes for the purpose of copying them at home. Nor can there be. In contrast to a sound recording which can be recorded for as little as $1 or less, it can cost upwards of $25 to tape a movie on a machine that costs at least $700. It is a rare consumer who will watch the same movie a sufficient number of times to justify the cost of renting and home taping rather than directly purchasing the tape. In short, any allegations that independent video rental dealers have significantly cut into move cassette sales is a red herring. Just the opposite is the case since the independent retailers provide virtually the only market for the cassettes.

Similarly, there is no foundation to any charge that independent video rentals are cutting into movie royalties from theater and TV display. Unlike the record industry, in which the issue of the record is the exclusive source of revenue, the movie industry earns revenue in four stages -- first from theater display, then from cable TV, then from network TV, and finally from cassette and disk sales. The cassette market is thus a residual market. It occupies even a lower rung than paperback books in the two tiers of the book industry. We have not abandoned the first sales doctrine for books. We should not do so for movies.

In sum, the proposed repeal of the first sale doctrine should be recognized for what it is: a back-door method for allowing the large motion picture companies to obtain monopoly power over the video cassette industry and to ruin the life savings of the 25,000 video retailers who have taken the risk and established the success of that industry. Giving the movie companies a vertical monopoly would be like giving the oil industry a Congressionally mandated monopoly over the production, refining, and marketing of crude oil -- or the auto industry monopoly control over the rental car business. Under our free enterprise system, the companies in each of these industries -- including the movie industry -- have the right to enter all phases of these businesses. Oil companies can explore, produce, refine, and market crude oil by entering each of these industries through the free market. Auto companies can produce and sell cars to companies like Hertz or Avis, who stand in the same relationship to General Motors, Ford, Chrysler and AMC as do the rental outlets to the movie industry. But none of the companies in the industry can control the rentals of theirs cars after they are sold, and if they tried the marketplace would be the author of their success.

Similarly, the movie industry has the existing opportunity in the marketplace to enter every phase of the video cassette industry. Motion picture companies can establish their own distributorships, set their own prices for sales of their cassettes, refuse to sell at all and establish their own rental distributor network. Indeed, the motion picture industry has recently acknowledged that it is pursuing the market approach by incorporating the copyright royalty in the charges it makes for its cassettes. As Jack Valenti, President of the Motion Picture Association of America testified on April 12 before the House Judiciary Committee:

> "Pre-recorded cassettes and discs are not part of the compensation being considered in the legislation before you. The copyright fee is included in the purchase price and/or rental charge." (p. 12) (Emphasis added).

We could not state the facts any better than Mr. Valenti. The movie industry already is earning the copyright fees to which it is lawfully entitled on the rental of cassette tapes. It has the power to raise those fees at any time to a level the market will permit. The market works. Congress should leave it alone to do its job, and not create a vertical monopoly by legislation.

RENTAL ONLY MOVIES

20th CENTURY FOX	(6 month program)

History of World Part I
Great Muppet Caper
Dr. No
Eyewitness
Blackie
For Your Eyes Only
Rocky
Final Conflict
Tatoo
Thunderbolt and Lighfoot
La Cage Aux Folles II
Eye of the Needle
From Russia with Love
Death Hunt
Zorro, Gay Blade
What's New Pussycat

MGM/CBS	(4 month program)

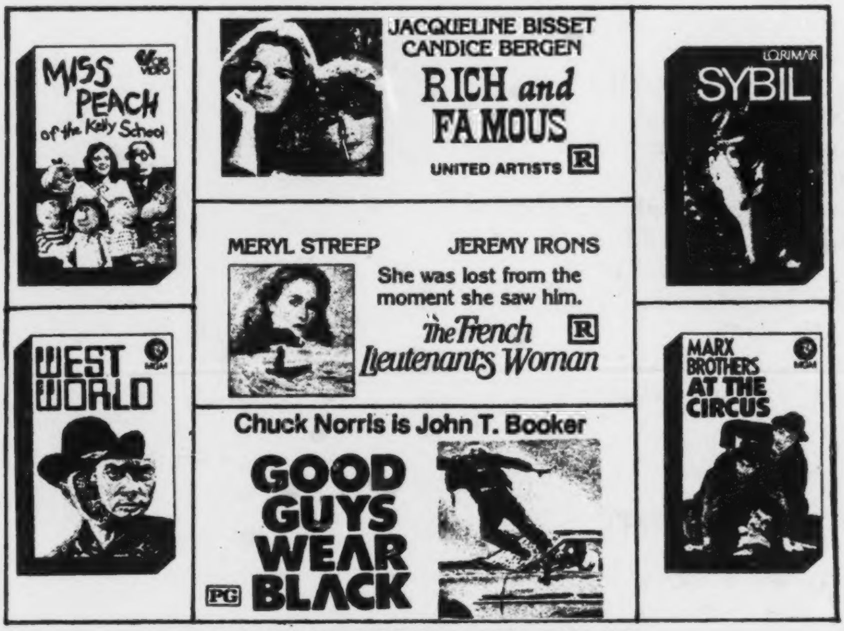
Tarzan The Apeman
S.O.B.
Rich and Famous
All the Marbles

WARNER BROS.	(Rental Only in Perpetuity)

Outland
Superman II
Body Heat
Arthur
Excalibur
Prince of the City
Blow Out
Wolfen
Private Benjamin
Altered States
The Shinning

zbs video, inc.

29001 Cedar Road, Suite 451 ■ Cleveland, Ohio 44124
(OHIO) 1-800-362-6124 ■ 1-800-321-8774 ■ 1-216-461-6275


MISS PEACH of the Kelly School
JACQUELINE BISSET
CANDICE BERGEN
RICH and FAMOUS
R
UNITED ARTISTS
LORIMAR
SYBIL
MERYL STREEP
JEREMY IRONS
She was lost from the moment she saw him.
The French Lieutenant's Woman
R
WEST WORLD
MGM
MARX BROTHERS AT THE CIRCUS
MGM
Chuck Norris is John T. Booker
GOOD GUYS WEAR BLACK
PG

NEW TITLES AVAILABLE SOON FROM ZBS

#'S	TITLE	PRICE	S/R	#'S	TITLE	PRICE	S/R
MG600097	WESTWORLD	45.50	59.95	VT6004	LOVING COUPLE	67.00	89.95
MG600122	SYBIL	45.50	59.95	VT6005	JOE	67.00	89.95
MG600124	MISS PEACH	45.50	59.95	VT6002	GOOD GUYS BL.	67.00	89.95
MG500123	PICASSO:DIARY	38.00	49.95	VT4002	BRILANT CARER	52.50	69.95
MG500121	AT THE CIRCUS	38.00	49.95	VT4001	COMEDY TONGHT	52.50	69.95
MG600120	GOOD EARTH	45.50	59.95	VT3008	LETS DANCE	45.00	59.95
NB035	SLAVES CANIBAL	36.00	59.95	VT3007	VIDEO AEROBCS	45.00	59.95
NB036	BEYOND ATLANTS	36.00	59.95	GM5501	MAN GLASS BOTH	46.00	59.95
GM5502	ICEMAN COMETH	61.00	79.95	GM5503	RHINOCEROS	46.00	59.95
GM5504	DELICATE BAL.	61.00	79.95	GM5505	LUTHER	46.00	59.95
GM5506	BUTLEY	61.00	79.95	GM5507	LOST IN STARS	46.00	59.95
GM5508	IN CELEBRATION	61.00	79.95	MG5509	MAIDS	46.00	59.95
GM5510	HOMECOMING	46.00	59.95	GM5511	GALILEO	61.00	79.95
GM5512	THREE SISTERS	61.00	79.95	GM5513	PHIL. HERE COM	46.00	59.95
GM5514	JACQUES BREL	46.00	59.95	GM2057	UNICORN VOL 1	46.00	59.95
GM2058	UNICORN VOL 2	46.00	59.95	UA4586	FR. LIEU WOM.	61.00	79.95
MD158	BODYGUARD	37.00	49.95	MD518	S.S. GIRLS	37.00	49.95
SL001	SHADES BLUE 1	40.00	59.95				

*Prices subject to change without notice. (3/8/82)

FOR RENTAL ONLY

MG00111 RICH AND FAMOUS 68.00 Rental period 4 months. Released April.

Senator **Mathias**. Our final panel for today will be led by Mr. Stanley Gortikov, president of the Recording Industry Association of America.

I regret that you are the last panel. I do not want to be any harsher with you on time than with any other panel. We want to dispense evenhanded justice here. On the other hand, I have a message from the majority leader, requiring me to be on the floor in the very near future, and that is something over which I have no control. So I will ask your utmost cooperation in keeping an eye on the red light.

Mr. Gortikov.

STATEMENT OF A PANEL, INCLUDING STANLEY GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.; F. E. DRAPER, EXECUTIVE DIRECTOR, MUSCLE SHOALS MUSIC ASSOCIATION; VICTOR W. FUENTEALBA, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS; JACK GOLODNER, DIRECTOR, DEPARTMENT OF PROFESSIONAL EMPLOYEES, AFL-CIO; AND DR. ALAN GREENSPAN, COUNSEL, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Mr. **Gortikov**. I am Stanley Gortikov, president of the Recording Industry Association, and I am scared, and so is my industry. Changing technology is threatening to destroy our copyrights, our vitality, and our capability.

HOME TAPING EXPLOSION

Home taping is costing our industry about $1 billion per year in lost sales. Now, at the touch of a pushbutton, anybody can copy our recorded music, free, and build a collection of recordings without even buying one record.

Take a look at this handy-dandy copyright killer on our chart. Its manufacturer calls it Tape City. It can copy onto a tape cassette recorded music from AM radio, from FM radio, from a 7-inch single record on a turntable, from a long-play album, from an eight-track cartridge, or even from another cassette in a side-by-side double slot.

Senator **Mathias**. What is the country of origin of that machine?

Mr. **Gortikov**. Japan.

We need your help because of this "bulldozer" of copyrights and other machines like it. Dramatic technology changes have triggered an explosion in home taping and in the sales of blank cassettes. Two hundred and twenty-eight million blank cassettes were sold in 1981, and the recording time in the last 10 years of those blank cassettes has jumped 291 percent.

Today's home taping explosion is reflected in a new Warner Research report, which found that 39 million persons are taping home music and that the retail market value of that music that is taped is now up to $2.85 billion.

Home tapers copy the equivalent of 455 million albums in a year. Yet, in 1981, our industry sold the equivalent in prerecorded albums of 475 million albums. So that is 475 million albums that we sold, versus 455 million albums that were home taped. So for about every album we sold, there was one taped. The reason most often cited by home tapers was, "So that I did not have to buy it." And Americans now are spending about $600 million a year to buy blank audio tapes to record music.

IMPACT ON MUSIC INDUSTRY

Most home taping is done by affluent, educated adults between 20 and 34 years of age—not by kids trying to scrimp along on their weekly allowance. These home tapers have a devastating impact on American music. They diminish the worth of investments. They expand our risks, reduce fair income. They jeopardize employment, careers, and they curb new releases, new artists, and new music.

Here is what the home tapers use to harm our industry. It is a blank cassette. It is nothing but a pile of plastic and chemicals and oxides and spindles, and it is useless until it comes alive with copyrighted music from those who we represent. It is just plastic. And that hurts.

In 1981, our industry published the number of new album titles that were released declined 8 percent below the previous year. That is a massive 32-percent decline, however, since 1978—32 percent fewer titles. So fewer new releases give fewer choices to music lovers, which violates the public interest and the real goals of the Copyright Act. And "copyright" was one word that Mr. Wayman did not even use in his testimony. So the more home taping, the less music there will be, even for the consumer who wishes to tape. But compensate those who create the music, and you assure the availability and diversity of that music. But the failure to enact a royalty causes even those who do buy the recordings to pay more, so that those who home tape do not have to pay anything at all.

THE HAZARD OF RENTALS

This bill addresses a problem also that we view as a ticking time bomb, the emerging practice of renting sound recordings. Here is a picture of such a threat—a record shop on Wilshire Boulevard in Los Angeles. On a big banner, it proclaims, "Rent-a-Record." And inside, for only 99 cents for 24 hours, you can take home any one of its 1,200 LP titles. Such rentals are for one purpose only: home taping.

Record rental shops are new to our shores, but record rental is a raging cancer in the recording industry in Japan. As recently as mid-1980, there were only about two dozen rental shops in all of Japan. Now, the count is 1,200. Ninety-seven percent of those who rent admit they record at home the records that they do rent. And wherever a record rental outlet operates, the conventional record stores in that area are experiencing declines in sales of more than 30 percent.

So even the organization in the United States which represents 15,000 audio wholesalers and retailers favors our stance on this particular issue. So when $1 billion per year of sales are lost to home taping, we know that it is hurting our copyrights, our careers, our jobs. We do not oppose technological change. We only ask that you preserve the copyright system so that we may save America's music.

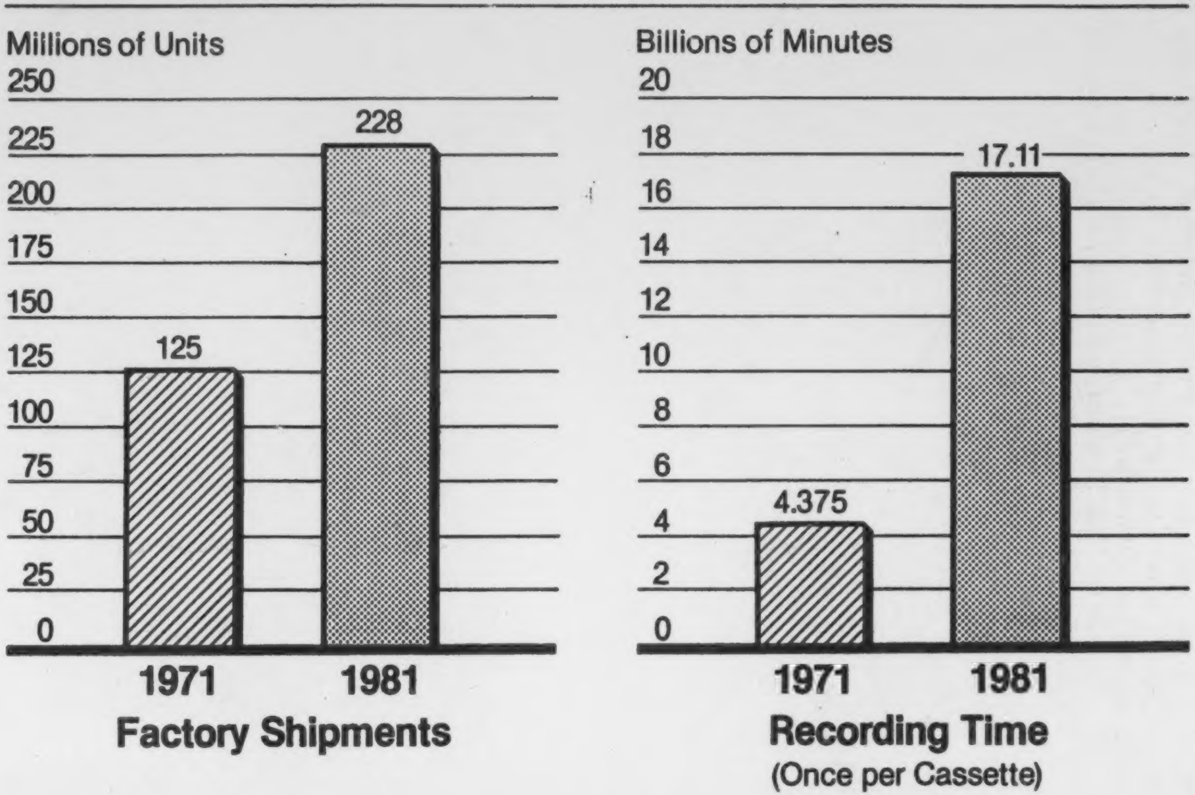
Thank you.

Senator **Mathias**. Thank you, Mr. Gortikov. Those displays you used in your testimony are, I think, very effective. I am wondering if you could give the Committee copies, so that we could include them as part of the record?

Mr. **Gortikov**. Yes, Senator, we shall be glad to do that.

[The following was received for the record:]

Blank Audio Cassettes
1971 vs 1981



Factory Shipments

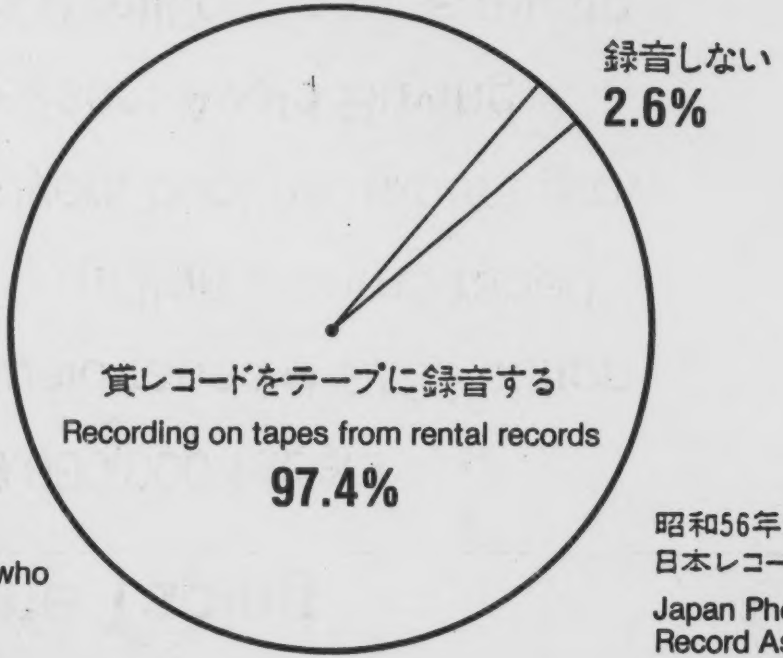
Recording Time
(Once per Cassette)

U.S. Home Taping

1. 39,000,000 tapers
2. Music taped = $2.85 billion
3. 455 million albums taped
4. Buyers decline, tapers grow
5. Reason: Avoid Buying
6. $600 million to tape music
7. Tapers affluent, educated
8. Tapers age 20 - 34

貸レコードからテープへの録音状況

Recording on Tapes from Rental Records



（貸レコード利用者
計1,000サンプル）
Took 1,000 persons who
utilize rental service
for sample

昭和56年9月
日本レコード協会調べ
Japan Phonograph.
Record Association

STATEMENT OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

APRIL 21, 1982

AUDIO HOME TAPING: THE CASE FOR A FAIR DEAL FOR COPYRIGHT OWNERS AND CONSUMERS

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2. "A Consumer Survey: Home Taping," March, 1982 (The "WCI Survey")

3. "A Survey of Households With Tape Playback Equipment," prepared for the Copyright Royalty Tribunal, September, 1979 (The "Hamilton Survey")

4. "Blank Tape Buyers: Their Attitudes and Impact on Pre-Recorded Music Sales," Fall, 1980 (The "CBS Survey")

5. "A Study on Tape Recording Practices Among the General Public," June, 1979 (The "Roper Survey")

6. Statement of Alan Greenspan Re: Amendment No. 1333 to S. 1758, Before the Senate Committee on the Judiciary, April 21, 1982

7. "The Legal Status of Home Audio Recording of Copyrighted Works," by Professor Melville B. Nimmer

8. Letter from J. Kamei, Executive Director, Japan Phonograph Record Association (Mar. 8, 1982)

AUDIO HOME TAPING:
THE CASE FOR A FAIR DEAL FOR COPYRIGHT OWNERS AND CONSUMERS

SUMMARY OF POSITION

The Recording Industry Association of America (RIAA) joins the entire musical arts community -- including 1,300 companies and more than 2 million individuals who have formed a Coalition to SAVE AMERICA'S MUSIC[1] -- in supporting prompt passage of the Mathias-Edwards "home taping" legislation (Amendment No. 1333 to S. 1758 and H.R. 5705).

That legislation would establish a fair mechanism for compensating copyright owners whose creative properties are being appropriated at massive levels through home taping. It would, at the same time, relieve home tapers of copyrighted audio and video works from liability for copyright infringement. This is a fair compromise of the interests at issue in the home taping controversy. It would provide compensation to creative artists for their works, protect the consumer, and avert the economic havoc that home taping promises to visit on the entire music industry.

1/ *See* Appendix One for a list of the Coalition's membership.

The Extent of Home Taping

Recent advances in audio taping technology and the increased availability of inexpensive, easy-to-operate, high quality recording devices have led to an explosion of home audio taping. A new study by Warner Communications Inc. (WCI) reveals, for example, that in 1980 home tapers copied recordings with an estimated market value of $2.85 billion -- the equivalent of 455 million albums. In 1981, by comparison, the recording industry sold the equivalent of only 475 million albums. Taping, in short, is taking over. And as a number of studies have revealed, the problem is getting worse, with most blank tape buyers reporting that they are taping more than ever before.

The Injury Caused by Home Taping

Home taping injures the recording industry and the entire musical arts community because it displaces sales of pre-recorded discs and tapes. The WCI Survey found that people tape primarily to avoid buying records, and that tapers make most of their copies from records which they do not own. In this way, home taping undermines the value of the copyrights in sound recordings and musical compositions.

The actual amount being lost as a direct result of home taping has risen to alarming levels. The Wall Street Journal recently estimated the annual loss to the recording industry at $1 billion. (February 18, 1982, p. 31.) Dr. Alan Greenspan, who has just completed an in-depth economic study of the issue, has estimated that in 1981 home audio taping displaced sales of records and pre-recorded tapes with a value of approximately $900 million. And, a 1979 CBS study estimated the loss of revenues from home audio taping in that year at $700 to $800 million. At stake is the economic well-being of one of the few American industries that has a positive influence on the Nation's balance of payments.

But home taping affects more than just record companies. Its devastating impact is felt by the musicians and vocalists from Nashville to Muscle Shoals who want to be recorded, the music publishers and songwriters from all parts of the United States who want outlets for their work, and the retailers, distributors, suppliers and manufacturers in virtually every community in the Nation who depend on the industry's vitality for their livelihoods.

The Public Interests at Issue

The public has a major stake as well. Since the adoption of the Constitution, our copyright system has been premised on the concept that the payment of royalties for the use of creative products is both a reward for the creator's labor and an incentive to future creativity. Widespread home taping makes a mockery of that principle. It is only from the sale of pre-recorded discs and tapes that record-makers are compensated. In displacing those sales, home taping deprives creators of their fair rewards and diminishes their incentive to invest time, effort and money in the high-risk recording industry.

Home taping also lessens the ability of record companies to develop and promote new talent and to subsidize special musical forms, such as classical, jazz, ethnic and gospel. The recording business is exceedingly risky; more than 80 percent of the records released fail even to recover their costs. Record companies rely on the revenues from the occasional hit to subsidize the losers, to finance recordings by unknown artists and new songwriters, and, hopefully, to make a profit. Home taping siphons off those revenues and, in so doing, undermines a principal objective of the copyright system -- to ensure the availability of the widest possible diversity of talent and art forms to Americans of varied tastes.

Significantly, the economic impact of home taping is also borne by the consumer. Home taping reduces the sales volume of records and pre-recorded tapes. The costs of production thus must be spread over fewer albums. This can force up the price of the records that are sold. As a result, those who buy records pay more so that those who tape off-the-air or from borrowed records can pay nothing.

The Solution to the Home Taping Problem

Congress is now considering legislation to resolve the home taping problem -- Amendment No. 1333 to S. 1758, introduced by Senator Mathias[2] and H.R. 5705, introduced by Representative Don Edwards.[3] RIAA

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[2] This amendment is also co-sponsored by Senators Baker, R. Byrd, Cranston, Stevens, Baucus, Hart, Boschwitz, Dodd, Cochran, Riegle, Kasten, Sasser, Burdick, Pressler and Boren.

[3] This bill is also co-sponsored by Representatives Schroeder, Quillen, Moorhead, Boner, Wright, Pashayan, Mineta, Waxman, Zeferetti, Dixon, Clay, Dymally, Chisholm, Fauntroy, Hefner, T. Evans, Carney, Fazio, Cheney, W. Ford, Moffett, Roybal, Reuss, Hawkins, Peyser, Patterson, Richmond, Downey, Bonior, Conyers, P. Mitchell, Edgar, Wilson, Dowdy, AuCoin, Ferraro, Leath, Hunter, Stark, Shannon, McHugh, J. Martin, Oberstar,

[Footnote continued on following page]

supports the Mathias and Edwards proposals because they embody the two basic principles that are essential to an even-handed solution to the home taping problem:

- first, those whose copyrighted works are being taped should be compensated in the form of a reasonable royalty on the sale of recording equipment and blank tape; and
- second, consumers who tape for private, noncommercial use in their homes should not be liable for copyright infringement.

[Footnote continued]
Stokes, Loeffler, Beard, Benedict, Vento, Gejdenson, Mikulski, McKinney, G. Miller, Fish, Bingham, Fowler, Holland, Weiss, J. Edwards, Derrick, Simon, D. Evans, G. Brown, and Beilenson.

AUDIO HOME TAPING: THE CASE FOR A FAIR DEAL FOR COPYRIGHT OWNERS AND CONSUMERS

It was not very many years ago that music could be communicated only in live performances; to experience the joy of music, one had to be there. But Thomas Edison's phonograph changed all that, and the rasping wax cylinder brought music into people's homes to be enjoyed at will. The miracle of radio made music even more widely available, delivering musical performances to homes the world over and, in the process, generating immeasurable goodwill abroad for our Nation and its people. In short, the advance of technology has made music accessible to all, enriching the lives of all who care to listen.

But the latest leap in technology -- the development of sophisticated taping devices -- threatens to undermine the very existence of the creators who have filled the airwaves and record stores with music. That new technology enables the individual, in his or her own home, and at the push of a button, to capture a musical performance forever -- for free. Indeed, today one can build an entire library of recorded music without ever purchasing a single record. If the musical arts are to maintain their vitality, this trend cannot continue without an appropriate legislative response. Copyright law must keep pace with and accommodate itself to this latest technological development by protecting and preserving the right of copyright owners to fair compensation.

This is not the first time that Congress has been called upon to save the rights of creators in the face of emerging technology. On prior occasions, Congress has developed imaginative responses to the challenge of protecting intellectual property rights while affording the public the benefits of the new technology (such as the advent of cable television and computer software). Congress faces that same type of challenge again today, this time to respond to the threat of home taping.

I. THE MASSIVE EXTENT OF HOME TAPING

Once a hobby pursued only by the serious audiophile, there has been a veritable explosion of home taping in recent years. Today, some 39 million Americans spend over $600 million a year to engage in the home taping of music.

The economic basis of this phenomenon was explained in an article in Forbes magazine:

> "With radio stations playing entire albums without commercial breaks and people trading records, taping is a far cheaper alternative to buying albums. A four-pack of Ampex tapes sells for around $6.50 and can record 12 albums worth up to $72. Not surprisingly, cassette sales are up as much as 30%. More significantly, imports of eight-track and cassette recorders -- few are made in the U.S. -- are up almost 18% this year."[4/]

No doubt, many radio broadcasters all over the Nation encourage home taping by playing new album releases in their entirety and without commercial interruption. It is, however, the increasing sophistication and technical quality of taping equipment, and the relative ease with which it can be operated, that have made the rapid escalation of home taping possible. And with its declining price and growing popularity, this equipment is becoming increasingly accessible. In 1977, 71 million people -- 39 percent of the U.S. population aged 10 or over -- lived in homes owning at least one piece of audio recording equipment. By 1980, that number had grown by almost 20 million, so that nearly half the U.S. population aged 10 or over -- 48 percent -- had access to home tape recording

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[4/] "Watching The Dollars," Forbes, Aug. 4, 1980, at 74.

equipment. (WCI Survey, 5.)[5] An even greater number -- 67 percent of the population -- now has access to tape playback equipment (such as the Sony "Walkman"). (Id.)

Not surprisingly, many people are using their equipment to tape records. The recent WCI Survey found that home taping of music is by far the most frequent taping activity. Seventy-five percent of all blank tape is used to record music. (WCI Survey, 9, 12.)

Moreover, music taping is not a sporadic or occasional activity. Another survey, prepared for the Copyright Royalty Tribunal,[6] found that most of those engaging in home taping of music record between one and five hours per month (Hamilton Survey, 4). About one-fourth of home tapers -- 23 percent -- record at least three hours of music per month, the equivalent of six record albums. (Hamilton Survey, Table 3.)

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[5] "A Consumer Survey: Home Taping," March 1982 (hereinafter referred to as the "WCI Survey"). The full text of the WCI Survey is set forth in Appendix Two.

[6] "A Survey of Households With Tape Playback Equipment," prepared for the Copyright Royalty Tribunal, September, 1979 (hereinafter referred to as the "Hamilton Survey"). The full text of the Hamilton Survey is set forth in Appendix Three.

Another barometer of the extent of home taping -- sales of blank tape to record music -- dramatically reveals how extensive home taping is today. In 1980 alone, Americans spent $600 million on tapes used to record music. (WCI Survey, 7.) Figures with respect to the sale of blank tape cassettes tell the same story. In 1971, Americans purchased under 4.4 billion minutes of blank cassettes. By 1981, that figure had soared to over 17 billion minutes.

A study of the amount of music recorded by home tapers also reveals the magnitude of the problem. According to the WCI Survey, Americans taped 251 million albums and more than 2 billion individual selections in 1980 (which constitute the equivalent of another 204 million albums) for a total of 455 million "albums" with a market value of $2.85 billion. (WCI Survey, 20.) In 1981, by comparison, the entire recording industry sold the equivalent of only 475 million albums.

Moreover, the extent of home taping of music shows every sign of increasing. According to a 1979 CBS Survey,[7/] 55 percent of the purchasers of blank tape indicated they were taping more that year than the previous one. (CBS Survey, 10.) And the WCI Study found that, from 1977 to 1980, there were significant increases in the percentage of the population who have access to recording equipment, who buy blank tape, and who engage in audio taping. (WCI Survey, 4-6.) In contrast, there has been a decline in the percentage

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[7/] "Blank Tape Buyers: Their Attitudes and Impact on Pre-Recorded Music Sales," Fall, 1980 (hereinafter referred to as the "CBS Survey"). The full text of the CBS Survey is set forth in Appendix Four.

of the population purchasing records and pre-recorded tapes.[8]

And, contrary to a popular misconception, home tapers are not, by and large, teenagers. Rather, 88 percent of all album taping and 78 percent of the taping of individual selections is done by persons over the age of 20. (WCI Survey, 26.)

Home taping is a substantial and growing phenomenon in America. And it has had a profoundly destructive effect on the recording industry and on the rest of the musical arts community, as we shall now demonstrate.

II. THE SERIOUS ECONOMIC AND CULTURAL IMPLICATIONS OF HOME TAPING

Home taping has had a debilitating impact on a high-risk American industry that is already reeling from the combined effects of burgeoning record piracy and counterfeiting, increasing competition from new entertainment forms and a sluggish economy. If uncompensated home taping continues to persist at present levels, it could well deliver a knock-out blow to the record and music communities. That blow will be felt by Americans in each and every state and city in the country -- including the music publishers, songwriters, performing artists, musicians, vocalists, retailers, distributors, manufacturers and suppliers who depend on and are an integral part of the American music industry. In addition, widespread home taping will have a negative impact on one of the few American industries that has a positive effect on the Nation's balance of payments and that has generated enormous goodwill around the globe.

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[8] "A Study On Tape Recording Practices Among the General Public," June, 1979 (hereinafter referred to as the "Roper Survey"). The principal conclusions of the Roper Survey are set forth in Appendix Five.

Finally, continued massive home taping will cause American record companies to release fewer records and experiment with fewer new artists, songwriters and musical forms. The record industry will no longer be able to cater to as broad a range of tastes as it does today. As a result, there will be a significant decline in the number and variety of records available to all consumers -- including the vast majority of Americans who do not tape.

A. The Impact of Lost Sales

It should come as no surprise that people engage in home taping primarily to avoid buying records. (CBS Survey, 11; WCI Survey, 16.) Likewise, the data confirm that tapers make most of their copies from records and pre-recorded tapes which they do not own. (WCI Survey, 22.)

Based on all of the survey data to date, financial statistics of the recording industry, and government data on sales of blank tape and recording equipment, Dr. Alan Greenspan has estimated that the amount of revenue that the recording industry lost in 1981 as a direct result of home taping was approximately $900 million.[9] In this connection, Dr. Greenspan has made the following points:

> -- Home taping has been rising at a very substantial pace in recent years. Assuming only a single use of a blank tape, in 1972 home taping accounted for 20 percent of the total hours of recorded music available both from purchase and taping. (This excludes music available from counterfeiting and piracy.) By 1981 home taping had risen to 42 percent of the total.

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[9] Dr. Greenspan's conclusions are reprinted in full in Appendix Six.

> -- This amount of home taping has had a substantial impact in displacing sales of sound recordings. Roughly 55 percent of the borrowed records used for home taping likely would have been purchased, had home taping not been possible. And about a third of the recordings taped off-the-air or made as duplicates of previously purchased records would have been bought in normal retail channels.
>
> -- Overall, this suggests that almost two-fifths of all home taping was in lieu of the purchase of prerecorded records or tapes last year.
>
> -- These data indicate that 28 percent of total record sales was displaced by home taping. That is comparable to lost record sales in 1981 of approximately $900 million.

Dr. Greenspan has also considered the practical effect that these lost sales have had and will continue to have on the recording industry:

> -- Record company profit margins dropped sharply in 1979 with the industry as a whole probably operating at a loss. The recovery since then appears to have been minimal.
>
> -- The volume of sales lost through home taping has disturbing implications for the recording industry and ultimately for those who purchase records. Already, employment in the industry has fallen off from its high in the late 1970s and total releases are down in the last three years by almost a third.

-- It is obvious that, as home taping continues to grow, the sale of records produced by the record industry will decline further. There will be fewer and fewer original performances on records for purchasers to enjoy and for tapers to copy.

-- If taping continues to erode record sales and profits, the recording industry might be forced to attempt to raise prices in an endeavor to recoup losses. That, however, would only further reduce the sales of pre-recorded music and probably further increase the shift toward lower cost home taping.

-- Alternatively, the record companies might be pressured competitively to cut prices to narrow the gap between home taping costs and retail record prices. That, of course, would accelerate the profit deterioration in the industry and decrease its capability to take the types of risks which the nature of the record business requires.

-- Thus, there is very little that the record industry can do to sustain its profitability in the face of the continued expansion of home taping.

-- For economic incentives to work appropriately, property rights must protect rights of capital assets whether in physical or intangible form. Home taping has resulted in severe economic damage to the owners of copyrights in sound recordings and musical compositions.

Apart from Dr. Greenspan's analysis, studies in the United States and all over the world[10] have confirmed that home taping is responsible for very significant lost sales. Indeed, the figures are staggering. For example, as previously indicated, the WCI study recently found that the actual market value of music taped at home in 1980 exceeded $2.85 billion. (WCI Survey, 24.) This is almost as large as the dollar value of legitimate consumer purchases of records and pre-recorded tapes for the entire industry, which amounted to between $3.3 to $3.68 billion for 1980.

An even more recent WCI research survey (to be published in the near future) indicates that for every 10 records taped, consumers would have purchased 4 records if taping were not possible. In other words, approximately 40 percent of taped records displace legitimate sales. If the 40 percent displacement figure is applied to the $2.85 billion market value of taped records, then the industry lost more than $1 billion in legitimate sales in 1980 from home taping. This figure, derived from WCI's two recent research studies, closely parallels the recent estimate in The Wall Street Journal that taping has caused a loss of $1 billion in record sales. (Feb. 18, 1982, at 31.)

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[10] *See*, *e.g.*, Reark Research Pty. Ltd., *Taping Survey: A Draft Report Prepared for Australian Record Industry Association* (March 1982); British Phonographic Industry Ltd., *A Levy on Blank Video and Audio Tapes and Associated Hardware* (July 1981); British Market Research Bureau Ltd., *Home Taping: Report on a Quantitative Survey* (January 1980); The Finnish Group of IFPI, *et al.*, *Gallup Survey Concerning the Music Recording Habits in Finland, Sweden, Norway and Denmark* (1980); Netherlands Association for the Phonographic Industry (NVPI), *Home Taping: Investigation Into the Making of Sound Copies on Tape and Cassettes by Individuals in the Netherlands in 1979* (September 1980).

Another approach to this question was used in the 1979 study by CBS, which inquired specifically about the sales lost to home taping. That survey revealed that, by reason of taping, home tapers forego the purchase of three pre-recorded albums or tapes each year. (CBS Survey, 14.) Based on that fact, CBS concluded that home taping deprived the music industry of up to 100 million unit sales in 1979, the equivalent of $700 to $800 million in lost sales. (CBS Survey, 15.) This three-year-old figure has grown larger, as shown by more recent surveys, with the continued explosive growth of home taping. Thus, by any measure, the damage to the record and music communities is of staggering proportions.

It is important to bear in mind that the economic impact of home taping is ultimately also borne by the consumer. Because home taping reduces sales volume, there are fewer albums over which the costs of production can be spread. This can force up the price of the records that are sold. Thus, in effect, those who buy records pay more so that those who tape off-the-air or from borrowed records can pay nothing.

Additionally, widespread home taping has a negative impact on the Nation's balance of trade. While most taping equipment and blank tapes bought in the United States are imported (principally from Japan) or produced by foreign-controlled interests, American music has long had a positive effect on our trade balance. We have traditionally exported about three times more phonograph records and other sound recordings than we have imported.[11] And our performance royalty receipts from foreign countries are more than three times the payments we make to copyright owners abroad.[12]

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[11] See, e.g., "U.S. Trade Shifts In Selected Commodity Areas," U.S. International Trade Commission Publication No. 1187, September, 1981.

[12] Based on ASCAP Financial Statement sent to ASCAP Members for the year ended December 31, 1980.

This is because American music sets the standard for the world. But as home taping dries up the amount of capital needed to produce new recordings for sale abroad, the American music industry will contribute less to the U.S. balance of trade.

Finally, widespread taping reduces the record companies' ability to release a large number and wide variety of new records to the public. Already, largely as a result of home taping, record companies are releasing fewer albums. In 1981, the industry released 32% fewer new albums than in 1978.[13] Singles and LPs combined were down 24%.[14] Moreover, companies are signing fewer new artists and experimenting less with new music, which have traditionally been the lifeblood of the industry. Record-makers simply can no longer afford the risks of experimentation.

A decline in new releases means that all American consumers (including the majority who do not tape) will no longer have access to the broad diversity of music that today meets varied consumer tastes and interests.

13/ RIAA 1981 Release Survey, April 1982.

14/ Id.

B. The Economic State of the Recording Industry

The explosive growth of home taping could not have come at a worse time from the standpoint of the recording industry. The loss of $1 billion of revenues each year as a result of home taping, combined with other factors such as burgeoning record piracy and counterfeiting, has left the recording industry in fragile condition.

After decades of consistent growth, the recording industry has suffered major setbacks in recent years. In 1979, for example, the industry had a loss of more than $200 million on its domestic sales.[15] The impact of that year on the health of the industry was the subject of an article in New York Magazine:

> "After four years of spectacular sales and profit growth, the $4-billion United States recorded-music business is going through a significant shakeout.
>
> "Record-company earnings have been falling, despite rising sales revenues. Albums that last year would have been expected to sell 2 million

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[15] Economic Study of the Recording Industry, prepared by the Cambridge Research Institute (April 7, 1980). Comparable data do not exist for the years 1980 or 1981.

> copies are doing half that much this year. Retailers have been hitting the manufacturers with waves of returned records at 100 cents on the dollar. Nearly 1,000 employees have been laid off in the industry, with CBS Records -- the largest U.S. company -- leading the way. Promotion budgets . . . have been cut severely. The panic factor has also set in, and the rumor mills are alive with reports of new shakeups and layoffs."16/

The downward trend since 1979 has not been reversed. While unit sales of premium blank tapes have been increasing, unit sales of records and pre-recorded tapes have been declining since that time at an alarming rate. Thus, the latest industry figures just released place total 1981 shipments of records and pre-recorded tapes at 594 million units. That figure represents a decrease of:

* 55 million units	or 8.5%	from 1980
* 89 million units	or 13%	from 1979
and		
* 132 million units	or 18%	from 1978

16/ "The Record Industry: Meltdown in the Wax Factories," New York, Aug. 13-20, 1979, at 10.

Even the rare hits are selling in smaller numbers than they once did -- in large part because they are being taped instead. The Chairman of A&M Records recently pointed out that an A&M production which won the award for best selling album in 1976 sold almost seven million copies in that year. Another A&M record which won the same award in 1979 sold just over four million copies and its current hit, which has been on "the top of the charts" as long as was its 1979 record, has not yet sold 1.7 million copies.[17]

For the industry as a whole, manufacturers' net shipments in 1981 amounted to $3.6 billion, down substantially from the 1978 figure of $4.13 billion.[18]

Needless to say, those declining figures are not based on any single factor. But no matter what explanations are offered, the extraordinary impact of home taping cannot be denied. In siphoning off nearly $1 billion in recording industry revenues, home taping undoubtedly has contributed to:

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[17] Testimony of Mr. Jerry Moss before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, April 14, 1982.

[18] Wall Street Journal, Feb. 18, 1972, at 31.

- the facts that those still in business have had to lay off thousands of employees, close down labels, reduce facilities, consolidate operations, slash their artist rosters, sharply limit their signing and promoting of new talent, and release fewer albums; and

- increases in the price of the records that are sold, thus making it more and more attractive each day to forego the purchase of a record and tape it instead.

In short, widespread home taping has recently created a genuine crisis for the recording industry. But beyond that, the harmful effects of home taping have spread across the country and touched the lives of Americans in cities and towns large and small. They are the songwriters, music publishers, recording artists, vocalists, musicians, retailers, distributors, manufacturers and suppliers who depend on the vitality of the recording industry for their own livelihoods.

III. HOME AUDIO TAPING CONSTITUTES COPYRIGHT INFRINGEMENT UNDER CURRENT LAW

The home taping question gained national prominence when the federal Court of Appeals for the Ninth Circuit -- in the so-called Betamax case -- held that off-the-air taping of copyrighted television programming in the home for private use constitutes copyright infringement.[19] The Betamax case did not decide the issue of home audio taping. However, some of those who urge Congress to reverse the Betamax decision have employed the fallacious argument that home video taping should be exempted from copyright infringement liability because home audio taping is already exempt under current law.

There are two separate points at issue. First, home taping proponents claim that home taping is actually exempt from the proscriptions of the Copyright Act of 1976. A second argument is that, even if home taping is not exempt, the "fair use" doctrine set forth in section 107 of the 1976 Act relieves the home taper of any infringement liability.

As demonstrated in the attached memorandum prepared by America's preeminent copyright scholar, UCLA law professor Melville B. Nimmer, this legal argument utterly fails on both counts. Professor Nimmer concludes, as to the first point, that "[t]here is not and never has been an exemption from copyright liability

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19/ *Universal City Studios Inc.* v. *Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), *reh'g denied* (9th Cir. Jan. 11, 1982), *petition for certiorari filed* (March 11, 1982).

for home audio recording." (Appendix Seven, at 1.) Second, he concludes that home audio taping is not immunized from infringement liability on the basis of "fair use" because it does not meet the relevant tests prescribed by the Copyright Act. (Id.)

A. There Is No Home Audio Taping Exemption

The Copyright Act of 1976 creates a broad reproduction right in Section 106(1), subject only to the express exemptions contained in Sections 107 through 118. There is no home recording exemption in any of those sections. Moreover, the legislative history of the 1976 Act is devoid of any reference to a home recording exemption.

The main source of the claim that there exists a "home audio recording exemption" is a single passage from the report of the House Judiciary Committee on the Sound Recording Amendment of 1971,[20] a statute that for the first time extended copyright protection to sound recordings and that was addressed to the problem of commercial record piracy. Additional comments on the home recording issue were made in hearing testimony and on the floor of the House.[21] These scattered references to home recording do not rise to the level of establishing an implied home audio taping exemption under current law. There are two reasons for reaching this conclusion.

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[20] See H.R. Rep. No. 92-487, 92nd Cong., 1st Sess. 7 (1971).

First, the 1971 Amendment itself contained no home recording exemption. There was no mention whatsoever of home recording in the Senate proceedings prior to the 1971 enactment. Thus, there is no justification for inferring a Congressional intent to create a home audio taping exemption either from the 1971 Amendment or its legislative history.

Second, and even more significantly, the House references to home recording pertained to a statute that was repealed by the comprehensive general revision of the copyright law in 1976. The current legal status of home audio taping is therefore to be found not in the 1971 Amendment or its legislative history, but rather in the Copyright Act of 1976. As already noted, neither that Act nor its legislative history contains any

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21/ These additional comments are discussed in detail by Professor Nimmer in his memorandum. (Appendix Seven, at 7-12.)

exemption for home audio taping beyond the defense of fair use. Indeed, the legislative history of the new law incorporates verbatim much of the language contained in the House report accompanying the 1971 Amendment, but entirely omits the passage referring to home recording.

Thus, as Professor Nimmer concludes, "[e]ven if . . . it be assumed that an audio recording exemption were somehow contained in the 1971 Amendment, it must be concluded that any such exemption was not carried over into the general revision of copyright law as embodied in the Copyright Act of 1976." (Appendix Seven, at 12.)[22]

B. Home Audio Taping Does Not Constitute "Fair Use"

The second issue is whether home taping, even if not exempt under the 1976 Act, nevertheless constitutes a "fair use" of the copyrighted sound recording and is therefore not an infringing act.

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[22] This conclusion is reinforced by the "Betamax" decision, in which it was held that:

> "The statute itself and the House and Senate reports accompanying the 1976 Act do not provide for a broad based home use exception." Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 968 (9th Cir. 1981), reh'g denied (9th Cir. Jan. 11, 1982), petition for certiorari filed (March 11, 1982).

The doctrine of fair use contained in section 107 of the Copyright Act does immunize certain uses of copyrighted works from infringement liability based upon a consideration of four statutory factors.[23] However, Professor Nimmer demonstrates that none of these factors justifies the conclusion that home audio taping of copyrighted sound recordings should be considered a fair use. (Appendix Seven, at 19-26.)

First, the judicial doctrine of fair use is generally limited to those cases where the purpose of the use is "productive," i.e., where it involves use by a second author of a first author's work for purposes such as criticism, comment, news reporting, teaching, scholarship or research. The doctrine is not applicable where the user makes a copy merely for purposes of entertainment. Yet that is precisely the purpose involved in home audio taping of records. Such use clearly does not satisfy the first fair use factor.[24]

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[23] These factors are:

> "(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) The nature of the copyrighted work;
>
> "(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) The effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

Second, a claim of fair use is less likely to be accepted where the nature of the work may be characterized as "entertainment" rather than information. Home audio taping of records obviously constitutes the copying of entertainment, not information.

Third, the fair use defense is generally unavailable in cases where the entire copyrighted work is copied. Yet home audio taping invariably involves the reproduction of an entire musical composition or sound recording.

Fourth, the defense of fair use is less and less applicable as the economic effect of the copying on the potential market for the copyrighted work becomes more and more severe. The studies, market statistics and economic analysis discussed in section II, above, vividly demonstrate the negative effect of home audio taping on the sales of records and pre-recorded tapes. Whatever the precise number of lost sales, there can be no doubt that it is substantial -- in the range of $1 billion. And, as Professor Nimmer states:

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[24] Nor can the purpose of home audio taping be characterized as "educational" or "noncommercial" within the meaning of the copyright law.

> "[These] studies merely confirm what is empirically obvious. There can be no doubt that audio home recording does have a devastating impact upon the potential market for music and sound recordings. If ever this fourth fair use factor were to militate against application of the fair use defense, it must do so in this case." (Appendix Seven, at 25.)

A separate consideration sometimes cited in support of the fair use defense is that audio home taping occurs in private homes. Professor Nimmer emphasizes that this does not make home taping a fair use:

> "This assumption that property rights of others somehow cease to operate within the confines of one's home is plainly fallacious." (Appendix Seven, at 27 n.49.)

No one would argue that one may destroy a book borrowed from a library as long as it is done within the four walls of one's home, or that one may freely use gas, electric and water services merely because those utilities have sent their property into private homes. Thus, while it may be difficult and certainly undesirable to enforce copyright infringement liability against an individual home taper, this difficulty does not render lawful an otherwise infringing act.

C. Current Law Does Not Provide an Adequate Mechanism To Compensate Copyright Owners for Home Audio Taping

Although home audio taping constitutes copyright infringement under current law, there is in fact no adequate mechanism to compensate copyright owners whose works are thereby appropriated. On the contrary, a series of legal actions to recover damages from individual home tapers would be both undesirable and impractical. Legal action against manufacturers and distributors of audio recorders and tape would be almost as difficult. Nor is there any assurance that such litigation would result in the creation of a fair, workable and enforceable royalty system for the future.

RIAA therefore believes that the home taping problem should be resolved with comprehensive legislation in the Congress, not through piecemeal litigation in the courts.[25] Just such a mechanism was suggested by the Court of Appeals in the "Betamax" case, when it indicated that a continuing royalty on the sale of recording equipment and tape "may very well be an acceptable resolution in this context."[26] As Professor Nimmer points out, such a royalty system would negate any concerns with the privacy implications of legal action against individual home tapers, while at the same time protect the interests of copyright owners. (Appendix Seven, at 26-31.) And while noting that such a royalty system could be imposed by judicial decree, he adds that the "far more efficient" approach would be for such a system to be adopted by legislation. (Id. at 30.) Professor Nimmer's conclusion, with which

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[25] The courts themselves evidently agree. The District Court in the "Betamax" case stated that:

> "[T]he full resolution of these issues is preeminently a problem for Congress . . . . The choices involve economic, social and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion." Universal City Studios Inc. v. Sony Corp. of America, 480 F. Supp. at 469. See also Universal City Studios Inc. v. Sony Corp. of America, 659 F.2d at 971.

[26] Universal City Studios Inc. v. Sony Corp. of America, 659 F.2d at 976.

RIAA strongly concurs, is that "[t]he proposed Mathias Amendment No. 1333 and Edwards Bill H.R. 5705 would accomplish exactly such a salutary objective." (*Id.* at 31.)

IV. BASIC CONSTITUTIONAL PRINCIPLES MANDATE COMPENSATION FOR HOME AUDIO TAPING

The purpose of the home taping legislation introduced by Senator Mathias and Representative Don Edwards is not merely to compensate copyright owners for the economic losses attributable to home audio taping, nor merely to provide an enforceable remedy for the infringement of existing legal rights, important though these purposes are. It also implements certain basic constitutional principles and property rights.

The first basic principle served by this legislation is found in the Copyright Clause of the U.S. Constitution. That clause authorizes Congress to establish a copyright system that will reward creators for the use of their works and thereby stimulate the creation of new works for the public benefit. Uncompensated home taping offends that constitutional principle because it denies creators a just reward for the use of their works. And by denying creative artists their just compensation, home taping frustrates the copyright system and thereby works to diminish the quantity and diversity of new creations that can be offered to the public.

The second basic principle served by this legislation is the right to compensation for the taking of private property. Home taping involves the invasion of legally protected property -- the exclusive right to reproduce a copyrighted work -- belonging to the owners of copyrights in sound recordings and musical works. Without any compensation, home taping is nothing more than a "home taking" of private property.

We next discuss each of these points in more detail.

A. The Constitutional Basis of Copyright Protection

In considering the issue of home taping, it is important to bear in mind that our American copyright system is based not merely upon statutory enactment but upon the United States Constitution itself. Article One, Section Eight of the Constitution authorizes the Congress:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The Supreme Court has explained the philosophy underlying the exercise of that power as follows:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . ."27/

In other words, the purpose of affording copyright protection is both to reward the creator and to encourage the production of literary and artistic works for the public benefit. As the Supreme Court has put it:

> "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly . . . lie in the general benefits derived by the public from the labor of authors.'"28/

The musical arts in our country have flourished under this system, and as a result, the consumer has enjoyed

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27/ Mazer v. Stein, 347 U.S. 201, 219 (1954).

28/ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

an unparallelled diversity of musical offerings, from classical and jazz to rock and country, from ethnic and gospel to soul and reggae.

Pursuant to the Copyright Clause of the Constitution, the Congress has given copyright owners of musical compositions and sound recordings the exclusive right to control, and obtain royalty payments for the use of, their creative works. Among these exclusive rights is the right to control the reproduction of their copyrighted musical works and sound recordings.29/ As discussed more fully in Section III, above, uncompensated home taping infringes those rights.

In understanding just why the copyright system is so essential to the recording industry, it is important to remember that the recording business is exceedingly risky. More than 80 percent of all records released fail even to recover their costs. On average, a company must sell almost 150,000 copies of a popular LP just to break even.

It is the copyright system that makes it possible for record companies and other creators to bear these

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29/ 17 U.S.C. § 106(1).

enormous risks and bring to the market an extraordinary variety and quality of musical offerings each year. Under that system, record companies are able to rely on the revenues derived from their ownership of the copyright in the occasional hit to subsidize the more than 80 percent that are losers, the recording of new unknown artists, and the release of special music (such as classical, jazz, ethnic, and gospel). In this way the copyright system not only enables the industry to survive, but also encourages experimentation and the promotion of unknown talents. It thereby ensures the availability of a broad variety of music.

Certainly, at a time when we are witnessing a decrease in public funding for the arts, the copyright system plays an even more vital role in fostering the production of new creative works. If the arts are to be self-sufficient, then Congress must ensure that the marketplace operates fairly and that copyright owners can obtain fair compensation notwithstanding technological developments.

Unless the home taping issue is resolved in such a way as to guarantee fair compensation to those whose intellectual property is now being appropriated in massive amounts, the recording industry will be unable to continue to bear the enormous risks of the marketplace. It will not be able to subsidize specialized forms of music or promote the variety of unknown artists and songwriters it has in the past. In the final analysis, the practical consequences of uncompensated home taping will be detrimental to everyone, including home tapers who will have less and less new material to tape and the large number of Americans (indeed the vast majority) who do not tape, but who buy records. By siphoning off revenues, home taping will not only force record prices higher, but will also cause further diminution in the quantity, quality and variety of music available to the public.

B. The Importance of the Property Interests at Stake

Musical compositions and sound recordings are, of course, a form of property. Like any other form of property, whether tangible or intangible, its owners possess the fundamental right under our constitutional system to preclude others from interfering with it. Home taping subverts that essential characteristic of copyright ownership. And that is not in anyone's interest. As the Register of Copyrights, Mr. David Ladd, has aptly said:

> "The public is served quite as much by a respect for property -- and copyright is the highest form of property -- as by expropriating it from its creators for mass, free use."[30]

Some confuse the application of private property principles to sound recordings by assuming that the copyright owner is adequately compensated as long as someone paid for the tangible recording from which tapes are made. That view is in error for two reasons. First, most taping is done from records that the taper never even bought. Second, even as to records the taper purchased, this view reflects a basic misunderstanding of the essential nature of intellectual property and copyright law. The record bought in the store is one type of property. It is tangible. It is owned by the purchaser and can be handled as he or she wishes. Embodied in it, however, is another form of legally protected property -- intangible, intellectual property protected by our copyright laws. That property does not belong to the purchaser of the record. As indicated in Section III, above, the right to reproduce or tape such property, under the 1976 Copyright Act, belongs exclusively to the copyright owner.

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[30] Speech of David Ladd, Register of Copyrights, before the National Council of Patent Law Association, Washington, D.C. October 31, 1981.

In understanding this distinction it is important to realize that intellectual property is not like a depreciable asset, such as a building, a car, or a tape recorder. The more such tangible properties are used, the less they are worth. By contrast, a musical composition, like a novel, becomes more valuable the more it is used. Whereas the seller of tangible property is fully compensated at the time of first sale, the owner of a copyright is paid only a small amount on the first sale, and realizes the full worth of his or her creation only as it is increasingly used in the marketplace.

Under fundamental copyright principles, the copyright owner is to be compensated for each reproduction of his or her creative work, including the home taping of that work. And this is especially so where, as is so often the case, the making of a tape recording actually serves as a substitute for the purchase of the record.

V. THE LEGISLATIVE SOLUTION

The Congress now has before it legislation that would provide a workable, even-handed solution to the home audio taping crisis -- namely, the Mathias-Edwards proposals. RIAA and the Coalition to SAVE AMERICA'S MUSIC support these proposals. They embody the two basic principles that are essential to any solution of the home taping problem:

(i) That those whose works are being taped should be compensated by means of a royalty on the sale of recording equipment and blank tapes; and

(ii) That consumers who tape copyrighted works in their homes for private, noncommercial use should not be liable for copyright infringement.

The Mathias-Edwards proposals make a number of key findings:

- that the copyright system has made the United States "a dynamic force in art and culture;"
- that the copyright system benefits both creators and consumers (the former by providing the incentive for the creation of new works and the latter by assuring "a rich and ever-increasing variety of works from which to choose");
- that home taping equipment and tapes are used for the purpose of reproducing copyrighted materials; and
- that home reproduction of copyrighted musical works and sound recordings is a copyright infringement under current law.[31]

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[31] These findings are set forth in the preamble to Amendment No. 1333 and in Section 1 of H.R. 5705.

The Mathias-Edwards proposals do not represent a novel approach to resolving the copyright issues raised by home taping. A home audio taping compensation system has been endorsed by joint committees of the two major international copyright treaties (the Berne Union and the Universal Copyright Convention).[32] Forerunner legislation has been enacted in two European nations (West Germany and Austria).[33] And as is discussed more fully below, comparable practices and procedures for determining and implementing the proper distribution of copyright royalties to copyright owners are already in place and are regularly employed by such private organizations as ASCAP and BMI.

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[32] *See* Report of the Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs (1977), *reprinted in Copyright* 406 (1977); Report of the Subcommittees of the Executive Committee of the Berne Union and of the Intergovernmental Committee of the Universal Copyright Convention on Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs (1978), *reprinted in Copyright* 87 (1978); Report of the Session, *reprinted in Copyright* 297 (1979). For a study of home taping under international copyright treaties, *see generally* Ficsor, "The Home Taping of Protected Works: An Acid Test for Copyright," *Copyright* 59 (1981).

[33] *See* West German Copyright Law of 1975, Art. 53(5), *reprinted in Copyright Laws and Treaties of the World* Item 1 at 10 (Supp. 1973); Austrian Copyright Amendments of 1980, Art. 42(5), *reprinted in Copyright* (Dec. 1980).

A. Home Tapers Would Be Exempt from Copyright Infringement Liability

The Mathias-Edwards legislation would exempt from copyright infringement liability any individual who makes a single audio recording of a musical work or a sound recording in his or her private home for private use. (§ 120(a).)[34] The exemption applies to recordings made off-the-air from radio, television, cable and other transmission services and to copies made from records or tapes themselves. (§ 120(d).)

B. Copyright Owners Would Be Compensated for Home Taping of Their Works

In addition, the legislation establishes a royalty system (known technically as a "compulsory license") to compensate copyright owners whose musical works or sound recordings are taped at home. (§ 120(b).) The royalty fees would be payable by domestic importers and manufacturers of audio recording equipment and blank tapes. (§ 120(b)(1).) Individuals who engage in exempt home taping activities would thus not become involved in the collection or distribution of royalties.

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[34] The audio provisions discussed here are contained in section 3 of the Mathias-Edwards proposals, which would add a new section 120 to the Copyright Act. References in the text are to the proposed new section numbers of title 17 of the U.S. Code.

The royalty requirements would apply to the first domestic sale of (1) audio recording devices designed, used or promoted for home taping, and (2) audio tape cassettes, cartridges or reels of a kind commonly sold for use in private homes. (§ 120(d).) Importers and manufacturers that complied with the royalty requirements would avoid any liability for copyright infringement. (§ 120(b)(2).)

As described more fully below, the royalty rate payable under this legislation by importers and manufacturers of recording equipment and tapes would be determined by the Copyright Royalty Tribunal. (§ 120(c).) The Tribunal is a specialized and experienced body, established by Congress in 1976 to determine, adjust and distribute the royalty fees payable by certain copyright users.[35] The system for collecting and distributing royalties is very similar to the compulsory license procedures established in the Copyright Act of 1976 for cable systems[36] and jukeboxes.[37]

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[35] The purpose, membership, procedures and other rules governing the Copyright Royalty Tribunal are set forth in Chapter 8 of the Copyright Act of 1976, 17 U.S.C. §§ 801-10.

(i) Determining the Royalty Rate

The royalty fees are intended to afford copyright owners "a fair compensation" for home audio taping of their works. (§ 120(c)(2).) The royalty rate would be determined by the Tribunal pursuant to a full evidentiary proceeding. (§ 120(c)(1).) An initial proceeding would be commenced within 30 days after the effective date of the legislation. (*Id*.) Subsequent proceedings to adjust the rate could be held in 1985 and at five-year intervals thereafter. (§ 120(c)(4).)

In considering royalties, the Tribunal would take into account those types of audio recording equipment and audio tape that are not used for taping copyrighted material. (§ 120(c)(3).) For instance, the Tribunal would likely find that equipment and tape suitable only for dictation or other business purposes would not be subject to a royalty. The Tribunal would also have the authority to adjust the royalty applicable to those types of tape or equipment used both for non-infringing purposes and home taping of music. (It bears noting that it is by no means clear that the added costs of such a royalty would be passed on to the consumers of that tape and equipment. Given the highly competitive nature of these markets, the manufacturers and importers may well absorb the cost of the royalty. Even if the costs were to be passed on, however, it is the manufacturers and importers of these products that have the ability to control the pass-on of these costs. That is, the manufacturers and importers can decide how to adjust their pricing structures so as to recoup the royalties selectively -- from the sale of those devices and media that are in fact used for home audio taping of music.)

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[36] Section 111 of the Copyright Act, 17 U.S.C. § 111, creates a compulsory license for retransmissions by cable systems of certain signals broadcast by television stations.

[37] Section 116 of the Copyright Act, 17 U.S.C. § 116, creates a compulsory license for the use of musical works in jukeboxes.

(ii) Collecting the Royalties

The royalty fees payable by manufacturers of audio recording equipment and blank tapes would initially be deposited with the Register of Copyrights, together with an informational notice and statement of account.

(§ 120(b)(1).) After deducting reasonable administrative costs, the Register would then transfer the fees to the U.S. Treasury for deposit in interest-bearing U.S. securities pending subsequent distribution to copyright owners. (§ 120(b)(3).)

(iii) Distributing the Royalties

Any owner of a copyright in a musical work or a sound recording that was transmitted over radio or television or sold to the public in the form of records or tapes during the pertinent period, would be entitled to file a claim for royalties with the Copyright Royalty Tribunal. (§ 120(b)(4).) Copyright owners would be given a limited antitrust exemption to permit them to agree among themselves as to the proportionate division of fees, or to lump their claims together, or to appoint a common agent to receive payment on their behalf. (§ 120(b)(5)(A).) This would enable them to create or appoint a collection agency such as ASCAP and BMI[38] to represent them, and would obviate the need for multiple claims by individual copyright owners.

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[38] ASCAP and BMI are two of several private organizations created by composers, authors and publishers to collect royalty fees payable for public performances of musical works.

If the Tribunal determined that there was no controversy concerning the distribution of fees, it would distribute them according to the claims filed with it. (§ 120(b)(5)(B).) In the event of a controversy, however, the Tribunal would conduct an evidentiary proceeding to determine the distribution of fees subject to dispute. (Id.) In the meantime, the Tribunal could distribute any uncontested fees. (§ 120(b)(5)(C).)

In practice the royalty pool would initially be divided between the two major groups of copyright owners -- those who own copyrights in sound recordings and those who own copyrights in the underlying musical compositions. These sums would be shared by all of the participants in the creation of the copyrighted works -- including composers, musicians, vocalists and recording artists -- through contractual arrangements.

This distribution system has already been tried and tested in analogous areas of our copyright law. The private sector -- through organizations such as ASCAP and BMI -- has for years distributed royalty fees to composers, authors and publishers for public performances of musical works over radio, television and before live audiences. In addition, the Copyright Royalty Tribunal has almost identical responsibilities under current law for overseeing the distribution of cable television[39/] and jukebox royalty fees.[40/] The Tribunal has now completed two formal proceedings to distribute cable television and jukebox royalty fees and, in the process, has developed criteria and standards to provide for a fair royalty distribution among copyright owners whose works are performed by cable television systems and in jukeboxes. The Tribunal thus has a solid base of experience to develop a reasonable system for distributing royalties to compensate copyright owners for home taping of their works.

Moreover, copyright owners would be able to rely on existing data collection systems for the basic information required for the distribution of home taping royalties. For instance, for radio transmissions, copyright owners might subscribe to the ASCAP or BMI data bases which are now routinely developed in connection with the distribution of performance royalties

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[39/] 17 U.S.C. § 111(d).

[40/] 17 U.S.C. § 116(c).

to music copyright owners.[41] There is also an existing data base available for television transmissions which has been used in the Tribunal's cable television royalty proceeding.[42]

Where the claimants are able to reach agreement among themselves, the royalty fees would be distributed without any government involvement.[43] Where an agreement could not be reached, a distribution proceeding would be conducted in exactly the same manner as proceedings already conducted by the Tribunal under the current law for the distribution of contested cable television and jukebox royalty fees. The administrative costs incurred by the Tribunal in determining the distribution of royalties would be deducted from the fees payable to copyright owners (§ 120(b)(5)(B)), and would not impose any additional costs on American taxpayers.

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[41] Both ASCAP and BMI use statistically valid sampling techniques to monitor airplay. The assembled data is weighted in accordance with a formula which takes account of the time, place and type of performance: on the basis of those factors, credits are assigned to the various copyrighted works performed.

With respect to audio recordings, surveys could also be used to determine the amount of home taping of records and tapes sold during the relevant accounting period. Based on those data, credits could be assigned to the various copyrighted works involved.

[42] The Motion Picture Association of America has used Neilsen data on television programming to develop a formula for the distribution of cable royalties to the individual companies owning copyrights in movies and syndicated television programming. Data such as those used in the cable distribution proceeding could be developed to determine the extent to which various radio or television transmissions are taped at home.

[43] Significantly, the process of royalty division among the various motion picture companies in connection with cable royalty distribution proceeds largely without any Tribunal involvement, because the private parties have agreed entirely among themselves. However, the Tribunal retains residual authority to referee any disputes among the parties.

In conclusion, the administrative procedure that would be established by the Mathias-Edwards legislation is practical and time-tested.

C. The Fair Marketing Amendment -- a Response to the Problem of Record Rentals

The Mathias-Edwards legislation also contains a provision that would deal with the emerging problems created by retail establishments that rent sound recordings for individuals to tape at home. It is now possible to rent an album for a modest fee, tape the album at home, and then return it to the record store. The potential effect of this practice on record sales and the copyrights of creators is devastating.

If the home taping problem is to be tackled comprehensively by the Congress, a provision dealing with this new phenomenon must be included in the legislative solution. The new provision proposed by Senator Mathias, Representative Edwards and others would permit copyright owners to control commercial record rentals; it would not affect noncommercial rentals or private lending or borrowing.

(i) Background

The retail record rental business made its first appearance in Japan. The first record rental outlet opened in Tokyo in June 1980.[44] By February 1982, it was estimated that there were over 1,100 rental outlets throughout Japan.[45] The phenomenon soon spread to Canada, where there are now 10 outlets operating under the "Rena's Rent-A-Record" franchise.[46] Then, in September 1981, Rena's Rent-A-Record opened its first franchise outlet in the United States, in Providence, Rhode Island.[47] Additional outlets are planned in Detroit, Chicago, Cleveland, Baton Rouge, Los Angeles and New York. Other record retailers have opened rental operations in Los Angeles and Michigan.

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[44] See "Japanese Disc Production Off; Rental Blamed," Billboard, Feb. 27, 1982, at 1.

[45] Letter from J. Kamei, Executive Director, Japan Phonograph Record Association (Mar. 8, 1982). (Attached as Appendix Eight.)

[46] See Greene, "Albums for Rent," The Sacramento Bee, Feb. 22, 1982, at B-3; see also "Retailer to Franchise Rent-A-Disc Scheme," Billboard, Feb. 28, 1981, at 57; "Disc Rental Chain Expands, Video Offered," Billboard, May 30, 1981, at 63.

The rental outlet in Providence offers a wide variety of albums for a 36-hour rental period.[48] The outlet also sells blank tapes, and during its opening week gave away a free 90-minute cassette with each customer's first rental.[49] The Canadian franchisor, Mr. David Nancoff, describes his business as "unbelievable," and says that he has "never had anything so good in my life."[50]

Of course, the purpose and effect of these commercial record rental schemes is to facilitate home taping. As indicated by the chart on the following page, 97.4 percent of all rental outlet users surveyed in Japan said that they recorded rented records at home.

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[47] *See* Lichtman, "Rent-A-Record Bows Unit in U.S.," *Billboard*, Aug. 19, 1981, at 3.

[48] *Id.*

[49] *Id.*

[50] *Id.*

A record rental (for as little as 99 cents at one Los Angeles store) and blank tape purchase is just a cheaper way of "buying" a record, except that no compensation is paid to the songwriter, publisher, musician, vocalist or record company. The extraordinary -- and chilling -- impact of these record rentals on record sales is illustrated by the Japanese experience. According to a recent survey in that country, record sales by retail stores in the vicinity of the rental outlets dropped by 30 percent.[51] Overall, Japanese record production fell in 1981 -- for the first time in 25 years -- by 15 percent.[52] The Japanese figures are an omen of things to come in the United States.

(ii) Current Law

Under the Copyright Act of 1976, the copyright owner has the right to control or obtain royalties for the public distribution of copies of a copyrighted work, including a sound recording.[53] This distribution right includes the right to distribute copies to the public by sale, rental, lease or lending.[54] However, under present statutory provisions, the distribution right -- unlike the other rights of reproduction, public performance and public display -- is "exhausted" after the first sale of a particular copy of the work to an individual. Thus, a purchaser of a record is free to dispose of the record (though not to reproduce it) without copyright liability.[55]

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[51] Letter from J. Kamei, Executive Director, Japan Phonograph Record Association (Mar. 8, 1982) (attached as Appendix Eight); see also Fujita, "Japanese Production Off; Rental Blamed," Billboard, Feb. 27, 1982, at 1.

[52] See Fujita, "Japanese Disc Production Off; Rental Blamed," Billboard, Feb. 27, 1982, at 1.

[53] See 17 U.S.C. § 106(3).

This is the so-called "first sale doctrine" in American copyright law. Retail record stores that purchase their record stock claim they are free to rent records again and again on a commercial basis without permission of or payment to the copyright owner. If stores engage in this rental activity, record producers, recording artists, composers, publishers and others involved in the musical and recording arts receive no compensation for commercial rentals of the records they have created.

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[54] Id.

[55] See 17 U.S.C. § 109(a).

(iii) The Need for Legislation

Commercial record rentals are part and parcel of the home taping problem. The widespread availabiity and growing technological sophistication of home taping equipment make record rentals a convenient option for acquiring high fidelity recorded music without ever purchasing a record. As the experience in Japan demonstrates, this possibility means that the record rental business can spread rapidly, and its growth adds more fuel to the home taping fire.

As a practical matter, the right to receive fair compensation for commercial record rentals is therefore a corollary of the right to receive fair compensation for home taping. Any comprehensive solution to the home taping problem should include a rental provision as well as a fair royalty on the sale of recorders and tapes.

Moreover, a rental provision is also needed to give full meaning to the basic constitutional principle that copyright owners should be able to control and obtain royalty payments for the reproduction of their creative works. Record rentals are made on a commercial basis, and for profit. Uncompensated commercial use of copyrighted works offends the Copyright Clause of the U.S. Constitution. This is especially true when record rentals are a substitute for record sales -- the only source of income for the record-makers who create sound recordings.

The first sale doctrine made sense once upon a time -- when there was no rental market for recorded music or sophisticated taping technology. Today, the rental market is about to explode in the United States as it has in Japan. Thus the first sale doctrine needs to be revised. This revision has already begun in the international copyright community and in many foreign nations.[56] The home taping legislation now before the Congress affords an opportunity to resolve the rental problem in the United States before it gets out of hand.

(iv) The Mathias-Edwards Approach

The Mathias-Edwards legislation would amend the first sale doctrine contained in section 109(a) of the Copyright Act to provide that the owner of a particular copy of a sound recording or motion picture could not rent, lease or lend it for purposes of commercial advantage without the permission of the copyright owner.[57/] Thus, a retail record store that purchased its record stock could not rent, lease or lend a record unless authorized by the copyright owner.

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[56] At a meeting last December, the Secretariats of the Berne Convention and the Universal Copyright Convention undertook to make a comparative study of national legislation on the rental of video and audio recordings, with particular emphasis on the right of distribution and the first sale doctrine. See Jones, "IFPI Seeking to Control Disc Rental Proliferation," Billboard, Feb. 27, 1982, at 3, 52.

The new provision would not apply to noncommercial rentals, or to private borrowing or lending. Nor would it affect the resale of a purchased record. Its only purpose is to permit copyright owners to control and obtain royalty payments for commercial record rentals during the term of the copyright.

CONCLUSION

American copyright law is largely the progeny of what was once a new technology, the printing press. In the two centuries since the framers authored the Copyright Clause of our Constitution, and particularly in the last two decades, the law of copyright has been shaped and reshaped to accommodate and account for the

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57/ The new provision is contained in section 5 of Amendment No. 1333 to S. 1758, and in section 6 of H.R. 5705.

evolutionary course of technological development. At each step in that process, Congress has afforded the public the full benefits of the technology of the day while meeting the challenge that it posed to the integrity of the copyright system.

Congress is now called upon to reaffirm the basic principles of copyright -- namely, that both justice and the public good require that creators, for limited times, have "exclusive Right" to their works. It is called upon to do so in response to the recent generational leap in the sophistication and utility of home taping equipment and media. In the absence of such action by the Congress, uncompensated home taping will continue to erode the vitality of the copyright system -- to the detriment of creators, the recording industry and, ultimately, the public.

Home taping has exploded. The shrapnel of that explosion drains the lifeblood of the musical community -- the creative stimulus of its musicians and vocalists, songwriters and publishers. It renders weak the recording companies whose works have become a worldwide means of communication. And it threatens the very livelihoods of thousands of retailers, distributors, suppliers and manufacturers who make the industry work.

If present trends continue, home taping will gradually, but most certainly, debilitate the entire industry.

Uncompensated home taping ill-serves the public as well. By denying just compensation to the creators of musical works, home taping diminishes the ability and incentive of record companies to discover and promote new talent and to make available music forms, such as classical and jazz, that are generally unprofitable.

Home tapers should not be liable for copyright infringement. Nor should the manufacturers of taping equipment and blank tape find themselves at legal risk for contributory infringement liability. And copyright owners whose creative talents are exploited through home taping should be fairly compensated for their work.

Congress has before it legislation offered by Senator Mathias, Representative Don Edwards and others that implements these basic principles and thus represents a fair and complete compromise of the interests at issue in the home taping controversy. That legislation should be enacted. It is a fair deal for both copyright owners and consumers.

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Coalition to SAVE AMERICA'S MUSIC

The Coalition to SAVE AMERICA'S MUSIC represents nearly 2 million individual members and about 1,300 companies.

The objective of the music industry and our SAVE AMERICA'S MUSIC Coalition is to support the passage of Amendment 1333 (to Senate Bill 1758) in the Senate, and H.R.5705 in the House -- and we urge Congress to enact them promptly.

American Federation of Musicians (AFM), 1500 Broadway, New York, NY 10036, (212) 869-1330 -- Membership, 300,000, affiliated with the AFL-CIO. Protects the employment rights of professional musicians in all fields in the U.S. and Canada, including collective bargaining agreements.

American Federation of Television & Radio Artists (AFTRA), 1350 Avenue of the Americas, New York, NY 10019, (212) 265-7700 -- Membership, 55,000. Negotiates and administers collective bargaining agreements for professional performers and broadcasters for live and taped broadcast performances, phonograph recordings, and audio-visual productions.

American Guild of Authors & Composers (AGAC), 40 W. 57th Street, New York, NY 10019, (212) 757-8833 -- Membership, 4,000. Protects its American songwriter membership through the AGAC Contract in dealings with music publishers.

American Society of Composers, Authors & Publishers (ASCAP), 1 Lincoln Plaza New York, NY 10023, (212) 595-3050 -- Membership, 30,000. Founded in 1914 to license and collect fees for the rights to public performances of its members' copyrighted musical works, and to distribute such income.

Black Music Association (BMA), 1500 Locust Street, Suite 1905, Philadelphia, PA 19102, (215) 545-8600 -- Membership, 2,000. Includes performers, producers, promoters, and record company executives whose objectives are to promote, perpetuate and preserve black music.

Broadcast Music, Inc. (BMI), 320 W. 57th Street, New York, NY 10019, (212) 586-2000 -- Affiliates, 68,000. Founded in 1940 to represent writers and publishers, licensing, collecting and distributing fees for their publicly performed musical repertory.

Country Music Association (CMA), P.O. Box 22299 Nashville, TN 37202, (615) 244-2840 -- Membership, 6,000, including international representation. Trade association dedicated to promoting and preserving country music through such activity as the CMA Awards Show and the Country Music Foundation.

Gospel Music Association (GMA), P.O. Box 23201, Nashville, TN 37202, (615) 242-0303 -- Membership, 2,000, with international representation. Service organization whose purpose is to represent, promote and spread the word about gospel music, including presentation of the annual DOVE Awards.

(more)

Music Publishers' Association of the United States (MPA), 130 West 57th Street, New York, NY 10019 -- Membership, 61. Objectives are to promote the continuing education of music publishers, nationally and internationally, and to foster good relationships with the music trade.

Nashville Music Association (NMA), 14 Music Circle East, Nashville, TN 37203, (615) 242-9662 -- Membership, 805 including 95 founding members. Trade association dedicated to represent all forms of music entertainment in Nashville.

Nashville Songwriters Association International (NSAI), 25 Music Square West, Nashville, TN 37203, (615) 254-8903 -- Membership, 2,000. Dedicated to the advancement of musical composition and the protection of member rights, it holds educational seminars and maintains a Hall of Fame.

National Academy of Popular Music (NAPM), 1 Times Square, New York, NY 10036, (212) 221-1252 -- Membership, 350. Maintains Songwriters Hall of Fame, museum and reference archives on popular music, and annually elects members to Hall of Fame.

National Academy of Recording Arts & Sciences (NARAS), 4444 Riverside Dr., Suite 202, Burbank, CA 91505, (213) 843-8233 -- Membership, 5,000. Involved in the creative process of sound recording. Members, including singers, musicians, songwriters, composers and engineers, vote for and present annual GRAMMY Awards.

National Association of Recording Merchandisers (NARM), 1060 Kings Highway North, Cherry Hill, NJ 08034, (609) 795-5555 -- Membership, 500 retailers, rack-jobbers and independent distributors of sound recordings. Trade association founded in 1957 to protect the interests of the merchandising community and to promote the industry. Associate members include record companies and suppliers.

National Music Council (NMC), 250 W. 54th Street, Suite 300, New York, NY 10019, (212) 265-8132 -- Membership, 1,500,000 in 61 national music organizations. Umbrella organization chartered by Congress to function as an information and coordination service for members that include composers, lyricists, musicians, singers, teachers, publishers, music licensing groups and recording companies.

National Music Publishers Association (NMPA), 110 E. 59th Street, New York, NY 10022, (212) 751-1930 -- Membership, 275 publishers. Trade association representing publishers of American music, including fields of popular, classical, sacred, educational, concert, gospel and country music, collects and administers royalties through the Harry Fox Agency.

Recording Industry Association of America (RIAA), 888 7th Avenue, 9th Floor, New York, NY 10106, (212) 765-4330 -- Membership, 55 U.S. sound recording companies. Trade association founded in 1952 to work for the mutual interests and betterment of the industry. Activities include Anti-Piracy Intelligence Unit and certification of RIAA Gold/Platinum Records Awards.

SESAC Inc., 10 Columbus Circle, New York, NY 10019, (212) 586-3450 -- Affiliates, 1,500. Licenses and collects fees for use of works of its 1,000 songwriters and 500 publishers, and actively promotes its membership.

Society of Professional Audio Recording Studios (SPARS), 1400 North Crescent Heights, Los Angeles, CA 90046, (213) 656-9467 -- Membership, 100 recording studios, major manufacturers, record companies and producers. Trade association dedicated to excellence through innovation, communication and education.

4/1/82

2

A Consumer Survey

Home Taping

WARNER COMMUNICATIONS INC.

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Introduction

Like other creative forces in the music industry, Warner Communications Inc. (WCI) has been concerned with the rapid growth in home taping. In the recent past consumers could hear "what they wanted, when they wanted" only by purchasing a record or prerecorded tape. However, the marketing of inexpensive home recording equipment and blank audio tapes (primarily from foreign sources) has provided millions of people with an alternate way of bringing music and other professional entertainment into their homes. This means that by purchasing a tape recorder and blank tapes, a consumer can copy the works of artists, publishers, authors, composers, musicians, producers and recording companies without obtaining their permission or providing them with any compensation at all.

While some technological advances in professional sound recording have benefited the industry, we believe that home taping is causing serious harm to the industry including the many people who contribute to, work in, or otherwise participate in the creation, production and distribution of records and prerecorded tapes. At the present time more recorded music is finding its way into more homes than ever before; yet the creative talent is not sharing in this growth. At a time when demographic and market analyses suggest that there should be continued growth in the number of buyers of prerecorded music, there has actually been a decrease in the percent of the U.S. population purchasing records and prerecorded tapes. In marked contrast, the percent of the population engaging in home taping has significantly increased. Given these competing trends, we at WCI felt it important to obtain valid and reliable data on the nature and extent of home taping.

As a part of its continuing effort to develop better demographic and other marketing information about the domestic prerecorded music industry, WCI has underwritten the two most thorough, in-depth studies of the industry ever conducted. Unprecedented in scope, these studies have served to disprove many of the myths surrounding the prerecorded music consumer. In addition, they have identified new markets for prerecorded product and have helped to launch the industrywide "Give the Gift of Music" campaign. While our first study was directed primarily at obtaining data concerning the fundamental characteristics of the prerecorded music consumer,[1] our second study was designed to trace changes in the consumer that had taken place between 1977 and 1980, and to explore many other aspects of the industry.[2]

One such aspect was home taping. Among other things, we wished to determine how many people tape-record Music and other professional entertainment. Who are these tapers and what do they tape? How much money is spent on blank tapes that are used to record music? What is the market value of the material they record? What are the reasons for taping? To answer these and other questions, WCI dedicated a substantial portion of its 1980 nationwide consumer survey to home taping.

This report will describe the results of the home taping study. It will show that during the 1980 survey year, over *$600 million* worth of blank tape was used by some *39 million* people to bring over *$2.85 billion* worth of music (and other professional entertainment) into their homes. In addition, it will show that the bulk of these people are neither teenagers nor the economically disadvantaged. Instead they are primarily young adults (between 20 and 34 years of age) with high levels of education and family income. It will also show that the most frequent reason they give for taping is "so I don't have to buy it," and the majority of the music copied is taped from borrowed materials or broadcast performances.

Were home taping not possible, tapers would be spending hundreds of millions of additional dollars on records and prerecorded tapes.

[1] M. Kapp and M. Fishbein, "The Prerecorded Music Market: An Industry Survey," WCI, March, 1978.

[2] M. Kapp, S. Middlestadt and M. Fishbein, "The Prerecorded Music Market: A Consumer Survey – 1980," WCI, April, 1981.

Methodology

The data presented in this report are primarily based on 2,370 face-to-face interviews conducted in May and June of 1980. In a few places comparisons are made to data from 3,385 face-to-face interviews conducted in April and May of 1977. Respondents for both surveys were selected on the basis of a customized multi-stage stratified area probability sample encompassing the universe of all private households in the conterminous United States. The details of the sampling plan and the weighting model used to project the sample data to the U.S. population (age 10 and over) can be found in the Appendix.

In both the 1977 and 1980 sampling design, all field work, coding and key punching of the data were carried out under the direction of National Analysts, a division of Booz, Allen & Hamilton, Inc. The questionnaires were developed by Dr. Martin Fishbein (Professor of Psychology and Research Professor, Institute of Communication Research, University of Illinois) and Mr. Michael Kapp (President, Warner Special Products). Data analyses were conducted under the supervision of Dr. Fishbein and Dr. Susan E. Middlestadt (Research Director, Attitude & Behavior Research, Inc.). Dr. Fishbein, Dr. Middlestadt and Mr. Kapp were responsible for the preparation of this report.

Previous research has consistently shown that there is an enormous amount of home taping which causes the industry considerable harm. However, a review of this research revealed that the home taping question had been addressed in many ways. While some studies were based on *buyers of blank tape*, others were based on respondents who were *home tapers*. Similarly, while some researchers selected samples that were projectable to the U.S. population, others interviewed only those people living in homes with tape playback and/or recording equipment. Further, while some studies analyzed the number of blank tapes purchased, some focused on the amount of time spent taping, and still others were concerned with the number of albums or individual selections taped. Given these different samples of respondents and different methodologies, it is not surprising that specific findings about the nature and extent of home taping have often differed.

Because of these differences among previous studies, the 1980 WCI questionnaire addressed all aspects of home taping. More specifically, the questionnaire included approximately 100 questions covering blank tape buying and taping behavior. In many cases, the same behavior was described with several questions or combinations of questions. For example, respondents were not only asked to indicate their purchase and use of blank audio tapes, but they were asked to report the amount of time they spent in various taping activities and to report (in units) the amount of copying they had done.

Thus the 1980 questionnaire was designed to permit internal consistency checks for much of the data. For example, the proportion of time spent in copying music could be compared with the proportion of blank tapes used for this purpose. Similarly, we could determine whether the amount of time spent in taping complete albums was related to the number of complete albums that were copied. Not only have these comparative analyses enabled us to investigate the ways in which different measures of taping behavior are related, but they have provided strong evidence for the reliability and validity of the findings.

Findings
Part I
Changes in Home Taping From 1977 to 1980

Although the 1977 WCI survey focused on the consumer of prerecorded music, it included three questions of direct relevance to home taping: specifically, in 1977, 1) *all respondents* were asked to describe the tape players or recorders that they or other members of their household currently owned; 2) *those with access to recording equipment* (i.e., who lived in households containing at least one tape recorder) were asked if they had ever taped music; and 3) *all respondents* were asked if they had ever purchased blank audio tape either for their own use or to give to someone else.

In the Introduction to this report we asserted that there has been growth in home taping. This section will document this increase. It will be seen that from 1977 to 1980 there were clear increases in the percent of the population who have access to recording equipment, who have ever bought blank tape and (among those who have access to equipment) who have ever taped music.

A. Access to Recording Equipment

In both 1977 and 1980, all respondents were asked to describe in detail the tape playback and recording equipment that they or other members of their household currently owned. As we pointed out in our most recent report, "there has been a marked increase in the ownership of *tape* playback equipment. In contrast to 59% of the population in 1977, 67% of the population now have access to tape players."[1] More important for the present purposes, there has been an even greater increase in the percent of the population with access to tape *recorders*. In 1977, 71.3 million people (39% of the total U.S. population age 10 and over) lived in homes owning at least one piece of *recording* equipment. In three years, this number had grown to 89.6 million (48% of the population).

Table 1 shows the percentage of the total U.S. population with access to each type of recording equipment in the two survey years. It can be seen that more people have access to cassette recorders than to any other type of recorder. In addition, access to cassette recorders is increasing more rapidly than access to eight-track recorders and there has actually been a slight decrease in the percent of the population having access to reel-to-reel recorders.

TABLE 1

[illegible]

	[illegible]	
	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

*People can have access to more than one type of recorder

[1] Kapp, Middlestadt and Fishbein, 1981, p. 21

B. Blank Tape Buyers

In each of the two survey years, all respondents were asked whether they had *ever* bought any blank audio tape either for their own use or to give to someone else. In 1977, 70.9 million people (39% of the total U.S. population age 10 and over) had bought at least one blank audio tape in their lifetime. By 1980, 77.5 million people (41% of the population) had made such a purchase. Thus in three years, there were 6.6 million *new* buyers of blank audio tape.

C. Music Tapers

In 1977 only respondents with *access* to recording equipment (i.e., living in households containing at least one tape recorder) were asked if they had ever taped music. Since that time we have come to realize that a substantial number of people living in households without recording equipment engage in home taping (e.g., at a friend's house). Thus in 1980 we asked *all* respondents about their taping behavior. It should be clear that asking only people with *access* to recording equipment underestimates the number of home tapers. To illustrate, in 1980 when *all* respondents were asked, we found that 39% of the population had made at least one audio recording during their lifetime. Had we asked only people with *access* to recording equipment if they had ever taped, this percent would have been reduced to 32%.

In 1977, 21% of the population, representing 38.5 million people, had access to tape recording equipment *and* had taped music at least once in their lifetime. This number increased to 23% or 42.8 million people by 1980. Even though underestimates, these figures do provide clear evidence of an increase in the number of people who engage in the home taping of music and other professional entertainment.

All of the above data substantiate the conclusion that home taping is increasing. Let us now turn to an in-depth analysis of blank tape buying and taping behavior. The remainder of this report will be based only on the data obtained in the 1980 WCI survey. The twelve months ending in June of 1980 will be referred to as the 1980 survey year. Similarly, for ease of presentation, the term U.S. population will refer to the total U.S. population age 10 and over. Further, throughout this report, the term Music will include other forms of professional entertainment, such as Comedy and Spoken Word.

Findings
Part II
Blank Tape Buying

One way of assessing the nature and extent of home taping is to investigate the purchase and use of blank audio tapes. In this section it will be seen that over 60 million people spent almost $800 million on blank tape during the 1980 survey year. Fully 75% of this blank tape was ultimately used to record music. Thus consumers spent over $600 million on blank audio tapes in order to bring Music and other professional entertainment into their homes.

A. General Blank Tape Buying

As indicated in Part I, all respondents were asked whether they had ever purchased any type of blank audio tape either for their own use or to give to someone else. Those who said yes were asked how much they themselves had spent on blank tape in the past 12 months and how much of this amount was spent on blank tape for their own use.

As seen earlier, 41% of the total U.S. population age 10 and over representing 77.5 million people had bought at least one blank tape in their lifetime. The data presented in Table 2 further indicate that 32% of the population representing 60.4 million people bought a blank audio tape during the 1980 survey year. These current blank tape buyers spent slightly more than $799 million on blank tape.

TABLE 2

[illegible]

	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

B. Configuration of Blank Tapes Bought for Own Use

People who bought blank tape *for their own use* were then asked to report the number of blank 8-track, cassette and reel-to-reel tapes they had bought in the past 12 months. Table 3 shows the percent of the total population and the percent of own-use buyers who bought each configuration for his/her own use, as well as the percent of unit purchases accounted for by each configuration.

It can be seen that in the 1980 survey year cassettes were, by far, the most preferred blank tape configuration. Fully 76% of those who bought tapes for their own use bought cassettes, with cassette buyers outnumbering 8-track buyers more than 2 to 1. In addition, 3 out of every 4 blank tapes purchased for own use were cassettes.

TABLE 3

[illegible]

	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

*Respondents could buy more than one configuration of blank tape

C. Current Contents of Blank Tapes Bought for Own Use

Respondents were asked to indicate the current contents of the 8-tracks and cassettes they had purchased for their own use. Specifically, they were asked for the number of tapes that (1) were still blank, (2) contained school or office work, (3) contained personal or family recordings, and (4) contained music or other professional entertainment.

The data show that 7% of cartridges and 13% of cassettes were still blank at the time of the survey. If one assumes that these unused blank tapes will be used in the same fashion as those already recorded upon, Table 4 shows that 87% of 8 tracks and 71% of cassettes will, in the final analysis, be covered with music. By taking into account the frequency of purchase of each configuration and by assuming that the use of reel-to-reel tapes lies midway between the use of 8-tracks and cassettes (e.g., that 79% [(87 + 71)/2] of blank reel-to-reel tapes are used to record music), we arrive at the percentages in column 3 of Table 4 which shows final blank tape usage across all configurations. It can be seen that fully 75% of *all* blank tapes purchased in the 1980 survey year were ultimately used to record Music or other professional entertainment.

TABLE 4

Current Contents of Blank Tapes Bought for Own Use

	Percent of Blank 8-Tracks*	Percent of Blank Cassettes*	Percent of All Configurations*
School or Office Work	2%	11%	8%
Personal or Family Recordings	11	18	17
Music or Other Professional Entertainment	87	71	75
	100%	100%	100%

*Assuming that units still blank will be used in the same fashion as those already recorded upon

D. Estimated Dollars Based on Actual Units Purchased.

Recall that all respondents were asked to indicate (by configuration) the total number of blank tape units they had purchased for their own use as well as the number they had covered with music. By assuming that tapes purchased for others are used in the same way as those purchased for own use, the total number of blank tapes purchased as well as the number that are ultimately used to record music can be calculated. Table 5 shows total unit purchases as well as the number used to record music. As noted previously, 75% (257.7/344.3) of all blank tapes are ultimately used to record music.

By multiplying units purchased by the median price paid for each configuration at retail, it is possible to arrive at an independent estimate of dollars spent on all blank tape and more importantly, dollars spent on blank tape to record music. These data are also presented in Table 5.

Perhaps the first thing to note is that this method of multiplying units by median price results in an estimate of $799 million total spending on blank audio tape – the same figure as that obtained from the direct question concerning total dollar spending for blank tapes (See Table 2). This provides evidence for the internal consistency and validity of the data.

More important, as shown in Table 5, over $609 million was spent on the more than 250 million blank tapes used for the home taping of music. In other words, 76% (609/799) of all dollars spent on blank tapes was used to bring music into the home. As we will point out later, this $609 million figure provides a *very conservative* estimate of the additional amount of money that consumers would have spent on records and prerecorded tapes if home taping were not possible.

TABLE 5

[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

* The median price for a given configuration was obtained by considering the subsample of respondents who purchased only that configuration. For each respondent in this subsample the average price per tape was calculated (Dollars Spent for Own Use ÷ Units Purchased for Own Use). The price at retail used in table 5 is the median of these average prices.

Findings
Part III
Taping Behavior

Although an analysis of blank tape purchases and use provides one indication of the nature and extent of home taping, it must be realized that not all blank tape buyers are tapers and not all tapers purchased a blank audio tape during the 1980 survey year. In this section we will focus on the behavior of current tapers: that is, those people who made at least one recording during the 1980 survey year. It will be shown that the vast majority of *current* tapers are music tapers. Moreover, we shall see that over 36 million of these music tapers acknowledge taping albums and/or selections that are available in prerecorded form. These album and/or selection tapers have copied over 250 million complete albums and over 2 billion individual selections or excerpts from albums. To put this somewhat differently, home taping results in the copying of music and other professional entertainment that has a market value of more than $2.85 billion. The most frequent reason given for this vast amount of taping is to avoid buying and the majority of these recordings are made from broadcast performances and borrowed records/ prerecorded tapes, not from the tapers' own collections.

A. General Taping Behavior

All respondents were shown a card describing three types of audio taping: (1) school or office work, (2) personal or family recordings, and (3) music and other professional entertainment. They were asked if they had ever done any of these types of taping. Those who answered yes were then asked if they had done any of these types of taping in the past 12 months. As reported in Part I, 39% of the total U.S. population age 10 and over, or 73 million people, had made at least one audio recording in their lifetime. Further, 56 million people or 30%of the population were current tapers: that is, did some form of audio taping during the survey year.

B. Types of Taping

All current tapers were asked to indicate the number of hours they spent in each of the three types of taping in the past 12 months. Table 6 shows the percent of the total population and the percent of current tapers who spent at least some time making each type of recording. In addition, the Table also gives the percent of total taping hours accounted for by each type of recording.

The home taping of music is, by far, the most frequent taping activity: 21% of the population or 39 million people had recorded music or other professional entertainment during the survey year. Therefore, only 9% (30% – 21%) of the population make only nonmusic recordings.

Table 6 also shows that 66% of all taping hours were spent taping music. Recall from Table 4, however, that 75% of blank tapes were ultimately covered with music. This implies either that it takes less time to cover a tape with music than to cover it with personal, school or office recordings or that tapes used for nonmusic purposes are reused more frequently than tapes used to record music. In either case, it is important to note that the amount of time spent making different types of recordings does not accurately describe the amount of blank tape used to make these recordings. For example, if the percent of time spent making music recordings (66%) were used to estimate the percent of blank tapes used for this purpose, a serious underestimate of the actual percent of blank tape (75%) used to record music would result.

TABLE 6

*Tapers could make more than one type of recording. For example, 3 out of 5 Personal tapers and 1 out of 2 School tapers also tape music.

C. Number of Years Taping Music

Current music tapers were asked to indicate the length of time they had been taping music. More specifically, they were asked if they had been taping "less than a year, between 1 and 3 years, or more than 3 years." Table 7 shows the percent of the total population, as well as the percent of current music tapers, who had been taping music for each of these three lengths of time. In addition it shows the percent of music taping hours accounted for by each of these three groups.

Note first that fully 21% of all music tapers have been taping music for less than a year. Surprisingly, however, these "new" tapers account for a disproportionately small (13%) percent of the total time spent in taping music. In contrast, 41% of the music tapers have been taping for more than three years and these tapers account for more than half (55%) of the time spent taping music. These findings indicate that the longer one has been taping music, the more time one is likely to devote to this activity.

TABLE 7

[illegible]

D. All Music Taping vs. the Taping of Complete Albums and Individual Selections

All current music tapers were asked to report the number of hours they spent taping complete albums and then to report the number of hours they spent taping selections or excerpts from albums. Almost 93% of all music tapers (or 19% of the total population) readily acknowledged that they had taped complete albums, individual selections, or both. Although the remaining 7% were not asked what they taped, it should be realized that people taping live performances (be they recorded in person, or from radio or TV) will often not view this activity as the taping of an album or several selections. For example, after taping a Rolling Stones performance or a concert of the New York Philharmonic, some people might report that they had taped a number of selections. Others might perceive that they taped neither an album nor several selections, but "a Stones concert" or "an evening with the Philharmonic." We find that 78% of the total hours spent taping music were spent taping albums or selections. Since our primary concern is with the home taping of *prerecorded* music, the remainder of this report will consider only those 36.2 million people who are current album and/or selection tapers. This focus on complete album and/or selection tapers ignores an additional 2.8 million music tapers, even though it seems reasonable to assume that at least some of the music taped by these people was available in prerecorded form. Therefore the data described herein present a conservative view of the extent of album and selection taping.

E. Types of Tapers

Table 8a shows that the 36.2 million album and/or selection tapers can be divided into three distinct groups: (1) those who only tape complete albums (4% of the population), (2) those who tape both albums and selections (7% of the total population), and (3) those who only tape selections (8% of the population). Note that selection only tapers outnumber album only tapers by almost 2 to 1.

Table 8a shows that those who tape both albums and selections spend more time taping than do those who tape albums only or selections only. That is, although they represent only 35% of the album and/or selection tapers, those who do both types of taping account for more than half (51%) of the time spent taping prerecorded music. In contrast, while selection only tapers comprise 43% of album and/or selection tapers, they account for only 29% of the taping hours.

TABLE 8a

[illegible]

	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

[illegible]

Table 8b looks at these same data in a slightly different way. Here it can be seen that 11% of the population (7 + 4) have taped at least one complete album during the survey year and 15% (7 + 8) have taped at least one selection. More important, Table 8b indicates that more hours are spent taping selections (56%) than taping complete albums (44%). This means that those who tape both albums and selections spend more of their time taping selections than taping complete albums.

These are important findings since they point out that a complete analysis of home taping must focus at least as much upon selection tapers as upon complete album tapers. Unfortunately, this has not always been the case: most attention has been directed at the taping of complete albums. This concern with the home taping of complete albums has led some observers to overlook the 15.4 million music tapers who tape *only* selections or excerpts from albums.

TABLE 8b

Complete Album and Selection Taping*

	Percent of Total Population Over 10*	Percent of Album and/or Selection Tapers*	Percent of Album and/or Selection Hours
COMPLETE ALBUM	11%	57%	44%
SELECTION	15%	78	56
			100%

*Respondents could engage in both types of taping.

F. Reasons for Taping

All album and/or selection tapers were given a list of 14 reasons "for taping music and other professional entertainment *that they could have bought as records or prerecorded tapes*." They were asked to identify all the reasons why they had taped during the past 12 months and then to choose the one reason for which they taped *most* often. Table 9 gives the percent of current album and/or selection tapers mentioning each as a reason they taped at least once, as well as the percent who mentioned each as the reason they taped most often.

Perhaps not surprising, the primary reason for home taping is to avoid buying prerecorded product. More specifically, 45% of the album and/or selection tapers said they had made at least one recording so that they "didn't have to buy it," and 25% gave this as the reason they taped *most often*. The other major reasons for taping *most often* were: to make a copy for car or office (17%); because I enjoy creating my own programs (11%); because taping is fun (9%) and because tapes are easier and more convenient to use than records (9%). Taken together, these 5 reasons explain why 71% of album and/or selection tapers tape most often. Considering reasons for taping at least once during the survey year, it can be seen that, although in a slightly different order, these same five reasons are mentioned most frequently.

Three other points can be made about Table 9. First, although it has often been argued that a great deal of home taping occurs because of the poor quality of prerecorded tapes, note that only 10% of tapers made a recording for this reason and only 3% said they taped most often in order to "get a better quality recording than is available on prerecorded tapes." A different type of quality does arise as the sixth most important reason for taping. That is, 18% of the album and/or selection tapers have made at least one recording to preserve the quality of their records, while 8% said this was the reason they taped most often.

Second, it can be seen that more than twice as many people taped because of the lack of availability of prerecorded tapes than because of the poor quality of those tapes. For example, in contrast to the 3% who said they record most often because of the poor quality of prerecorded tapes, 7% said they record most often because a prerecorded tape is not available.

Finally, it must be realized that the findings in Table 9 are based on all current album and/or selection tapers and therefore do not show important differences among those who only tape albums, those who only tape selections and those who tape both. For example, while 27% of album only tapers said they taped most often to make a copy for their car or office, only 10% of selection only tapers gave this as their reason for taping most often. Similarly, while 20% of album only tapers said they have made at least one recording to preserve the quality of their records, this is true for only 11% of those people who tape only selections. A complete discussion of the differences among these three types of tapers is beyond the scope of the present report.

TABLE 9

[illegible]

	[illegible]	
	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

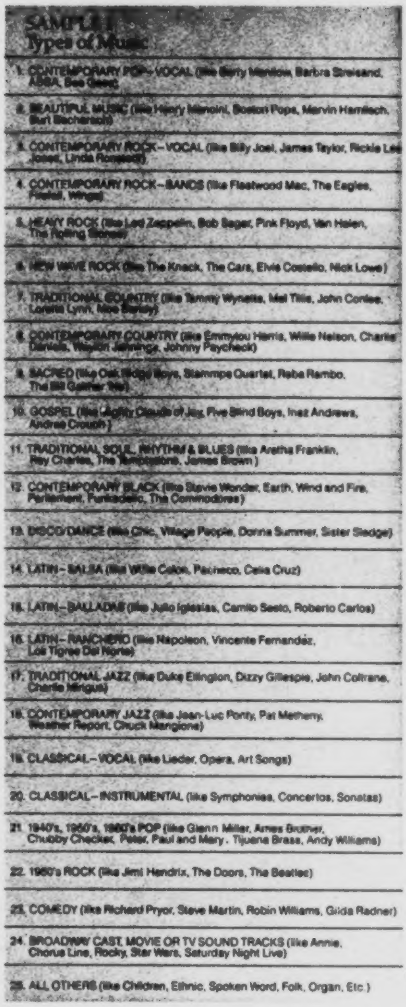
*Respondents could tape for more than one reason.

G. Type of Music Taped

All current album and/or selection tapers were handed a card describing 25 different Types of Music (see Sample 1). They were then asked to identify all the types they had recorded during the past 12 months and the one type they had recorded most often. Table 10 shows the percent of the album and/or selection tapers who taped different types of music at least once during the survey year, as well as the percent taping each type most often.

Not surprisingly, taping behavior is heavily concentrated upon those types of music that are purchased most often as records or prerecorded tapes. It can be seen that more people make home recordings of Rock music than of any other type. Fully 58% of all album and/or selection tapers have made at least one home recording of a Rock recording and 38% said that this is the Type of Music they record most often. In fact, with respect to music taped most often, Rock ranks first, Soul, R&B and Disco second. Other types of music taped most often are Country (12%), Classical (9%) and Contemporary Pop Vocal (7%).*

It should again be noted that Table 10 is based on *all* current album and/or selection tapers, and thus important differences among those taping selections only, albums only, and those who tape both selections and albums cannot be shown. For example, although all three groups tape Rock most often, this is true of 54% of those who only tape albums. In contrast, only 31% of those who only tape selections report Rock as the Type of Music they tape most often. One of the biggest differences between album only and selection only tapers concerns the taping of Soul, R & B, and Disco. While 43% of selection only tapers have taped this type of music at least once (with 20% saying they tape it most often), this is true of only 19% of the album only tapers (with 8% reporting this as the Type of Music they tape most often).



SAMPLE 1
Types of Music

1. CONTEMPORARY POP–VOCAL (like Barry Manilow, Barbra Streisand, ABBA, Bee Gees)
2. BEAUTIFUL MUSIC (like Henry Mancini, Boston Pops, Marvin Hamlisch, Burt Bacharach)
3. CONTEMPORARY ROCK–VOCAL (like Billy Joel, James Taylor, Rickie Lee Jones, Linda Ronstadt)
4. CONTEMPORARY ROCK–BANDS (like Fleetwood Mac, The Eagles, Firefall, Wings)
5. HEAVY ROCK (like Led Zeppelin, Bob Seger, Pink Floyd, Van Halen, The Rolling Stones)
6. NEW WAVE ROCK (like The Knack, The Cars, Elvis Costello, Nick Lowe)
7. TRADITIONAL COUNTRY (like Tammy Wynette, Mel Tillis, John Conlee, Loretta Lynn, Moe Bandy)
8. CONTEMPORARY COUNTRY (like Emmylou Harris, Willie Nelson, Charlie Daniels, Waylon Jennings, Johnny Paycheck)
9. SACRED (like Oak Ridge Boys, Stamps Quartet, Reba Rambo, The Bill Gaither Trio)
10. GOSPEL (like Mighty Clouds of Joy, Five Blind Boys, Inez Andrews, Andrae Crouch)
11. TRADITIONAL SOUL, RHYTHM & BLUES (like Aretha Franklin, Ray Charles, The Temptations, James Brown)
12. CONTEMPORARY BLACK (like Stevie Wonder, Earth, Wind and Fire, Parliament, Funkadelic, The Commodores)
13. DISCO/DANCE (like Chic, Village People, Donna Summer, Sister Sledge)
14. LATIN–SALSA (like Willie Colon, Pacheco, Celia Cruz)
15. LATIN–BALLADAS (like Julio Iglesias, Camilo Sesto, Roberto Carlos)
16. LATIN–RANCHERO (like Napoleon, Vincente Fernandéz, Los Tigres Del Norte)
17. TRADITIONAL JAZZ (like Duke Ellington, Dizzy Gillespie, John Coltrane, Charlie Mingus)
18. CONTEMPORARY JAZZ (like Jean-Luc Ponty, Pat Metheny, Weather Report, Chuck Mangione)
19. CLASSICAL–VOCAL (like Lieder, Opera, Art Songs)
20. CLASSICAL–INSTRUMENTAL (like Symphonies, Concertos, Sonatas)
21. 1940's, 1950's, 1960's POP (like Glenn Miller, Ames Brothers, Chubby Checker, Peter, Paul and Mary, Tijuana Brass, Andy Williams)
22. 1960's ROCK (like Jimi Hendrix, The Doors, The Beatles)
23. COMEDY (like Richard Pryor, Steve Martin, Robin Williams, Gilda Radner)
24. BROADWAY CAST, MOVIE OR TV SOUND TRACKS (like Annie, Chorus Line, Rocky, Star Wars, Saturday Night Live)
25. ALL OTHERS (like Children, Ethnic, Spoken Word, Folk, Organ, Etc.)

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*It is interesting to contrast these figures with the percent of current buyers who purchased each type most often. For example, Rock is bought most often by 35% of current buyers, Soul, R&B, Disco by 14% and Classical by 4% of current buyers. In each of these 3 cases the percent of tapers is greater than the percent of buyers. For a complete description of buying behavior see Kapp, Middlestadt, Fishbein, "The Prerecorded Music Market: A Consumer Survey – 1980," WCI, 1981

TABLE 10

Type of Music* Taped

	[illegible]	
	At Least Once	Most Often
CONTEMPORARY POP VOCAL	29%	[illegible]
ROCK	60	[illegible]
COUNTRY	[illegible]	[illegible]
SOUL, R & B, DISCO	37	17
CLASSICAL	[illegible]	[illegible]
BEAUTIFUL MUSIC	[illegible]	[illegible]
JAZZ	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
ALL OTHER	[illegible]	[illegible]

*Respondents could tape more than one type of music.

H. Number of Complete Albums and Selections Taped—Units

People who reported spending time taping complete albums were asked to indicate how many complete albums they taped. And people who reported spending time taping selections or excerpts were asked how many selections they taped. The data indicate that the 20.7 million complete album tapers copied a total of 251.2 million albums. In addition, the 28.2 million selection tapers copied 2044.2 million selections.

While we had anticipated the number of complete albums taped, we were initially surprised by the enormous number of selections that were taped. However, when it is realized that, on the average, selection tapers copy 72 selections or the equivalent of about 7 albums (at 10 selections per album) a year, the amount of selection taping does not appear to be unrealistic. Put somewhat differently, the more than 2 billion selections copied represent about 204 million albums. Thus album and/or selection tapers are taping the equivalent of approximately 455.million albums a year (251 million complete albums + 204 million "selection albums").

By converting selections into album equivalents, it also becomes possible to calculate the percent of total units taped that are complete albums and the percent that are "selection albums." We find that 55% of taped units are copies of complete albums (251/455), while 45% are "selection albums" (204/455).

I. Methodological Note: Units, Hours and Blank Tapes Purchased

Recall that, in contrast to the above finding, more time was spent taping selections than complete albums (see Table 8b). More specifically, although 44% of all taping time is spent in copying complete albums, these albums represent 55% of the units taped. These findings may initially appear contradictory. They are, in fact, quite consistent, since considerably more set-up time is necessary to tape 10 selections (or excerpts) than to tape a complete album. Nevertheless, these findings again point out that one cannot use time to directly estimate other types of taping behavior.

Along these same lines, it must also be recognized that the number of albums or individual selections taped cannot be directly estimated from the number of blank units bought. It was previously shown in Table 5 that our respondents purchased 257.7 million units of blank tape for the purpose of recording music. Yet, as we saw above, the equivalent of 455 million albums were actually taped. Even assuming that 1.5 albums could be recorded on the average blank tape, an estimate based on the number of blank tapes bought to record music would still underestimate the actual number of units taped (i.e., the estimate would be [257.7 x 1.5 =] 386.6 million "albums" taped).

It must be remembered, however, that blank tapes can be used more than once. To determine usage rates, we asked blank tape buyers who recorded music to tell us how often they used their music tapes. More specifically, respondents were asked to think about the blank tapes they had bought that were covered with music and to tell us how many of these tapes had been recorded on "only once, two or three times, or four or more times." Fully 77% of the blank tapes used to record music were used only once. Thirteen percent were used two or three times and the remaining 10% were used four or more times. This means that 25.8 million blank tapes (257.7 x .10) were used at least four times, 33.5 million two or three times and the remaining 198.4 million were used only once. To put this somewhat differently, the 257.7 million blank tapes were used at least 368.6 million times to record music [(25.8 x 4) + (33.5 x 2) + (198.4 x 1)]. Again assuming that 1.5 albums could have been recorded each time a tape was used, we would arrive at a figure of 552.9 million "albums" taped. Thus, by correcting for usage, we would overestimate, rather than underestimate, the amount of units actually taped. Nevertheless, it should be clear that the 257.7 million blank tape units purchased to record music are more than adequate to record the 455 million "albums" that were home taped.

The above findings illustrate that a consideration of blank tapes purchased, hours spent taping, and units taped will result in very different pictures of taping behavior. At the same time, however, we have seen that the data are internally consistent. That is, although one type of behavior cannot be used to estimate another, the relations among these behaviors are not only interpretable but are consistent with expectations.

TABLE 11a

Source of Complete Albums Taped

		Percent of Albums	Albums (in millions)
FROM OWN RECORDS OR TAPES		45%	112.[illegible]
FROM BORROWED RECORDS OR TAPES		34	85.2
FROM THE RADIO	55	21	[illegible]
SUM OF ALL SOURCES		100%	[illegible]

J. Source of Complete Albums and Selections Taped

Complete album tapers as well as selection tapers were asked to indicate separately the sources from which they copied the albums and/or selections they taped in the 1980 survey year. That is, complete album tapers were asked to indicate the number of complete albums copied from their own records or tapes, from borrowed records or tapes, or from the radio. Similarly, selection tapers were asked to indicate the number of selections they taped from each of these three sources (with radio being expanded to radio & TV). Tables 11a and 11b show the number, as well as the percent, of albums and

TABLE 11b

[illegible]

*This number is estimated (see footnote).

selections taped from each source. Note first that the sum of album units reported in Table 11a corresponds to the total number of taped albums reported above, again demonstrating the internal consistency of the data.

With respect to selections, it can be seen in Table 11b that the three sources accounted for 1928.9 million of the 2044.2 million selections reported earlier. It seems reasonable to assume that the remaining 115.3 million selections were taped from live performances.

Comparing Tables 11a and 11b, it can be seen that albums and selections are taped from very different sources. For example, while the greatest percent of selections are taped from the radio (40%), radio accounts for the smallest percent of complete albums (21%). Nevertheless, the majority of copies made were *not* made from records and prerecorded tapes in one's own collection: 55% of complete albums and 61% of individual selections were taped from either borrowed material or broadcast performances.

Note that this is not an estimate of the total amount of recording from live performances because 7% of all music tapers do not view their music taping as album or selection taping. As pointed out earlier, at least some of these tapers have taped while attending a live performance.

K. Market Value of Home Taped Music

Knowing the quantity of home taping that was taking place, we next wished to determine the market value of this music. That is, we wanted to determine the amount of money home tapers would have had to spend to purchase *prerecorded* versions of the albums and selections they taped. With respect to complete albums this posed no problem. We first considered the actual cost to the consumer of all prerecorded albums (be they LPs, 8-tracks or cassettes) purchased in the survey year. Taking into account the frequency of purchase of each configuration, we found that the median price per album was $6.27. It can be seen in Table 12 that at this price, the market value of all the complete albums taped in 1980 was $1576.9 million.

With respect to selections the problem is more complicated since selections can be either a copy of one side of a 45 RPM single or an excerpt from an album. If selections are viewed as one side of a prerecorded single, one could assess the value of each taped selection as half the retail cost of a 45 RPM single. However, it could also be argued that in order to own a prerecorded copy of the selection, the taper would have to purchase the single. Based on this argument, the value of each selection would be the median cost of a 45 RPM single. Since many selections are not available as prerecorded singles the taper would have to purchase the prerecorded album containing that selection. What seems most reasonable is to again view selections in terms of album equivalents. Looked at in this way, we treat every 10 selections that are home taped as being analogous to a compilation album (i.e., "The Best of. . ." or "Top Hits of the 70's"). By using the median price of $6.27 per album, Table 12 shows that the market value of these "selection albums" is $1281.6 million. It must be realized that valuing selections in this way results in a rather conservative estimate. *However, even being conservative, it can be seen in Table 12 that the total market value of the home taped selections and albums is $2858.5 million. To put this somewhat differently, home taping allows home tapers to bring over $2.85 billion of music and other professional entertainment into their homes.*

TABLE 12

[illegible]

*Median price from direct calculation.
**Selection albums = Selections/10.

Findings
Part IV
Demographics of Album and/or Selection Tapers

In the previous section we saw that people could engage in the home taping of complete albums, individual selections, or both. We recognize that an analysis of *all* complete album tapers and *all* selection tapers will obscure some of the differences between album *only* and selection *only* tapers. Nevertheless, to describe complete album tapers, for example, it is necessary to look at the characteristics of all album tapers and not just those who only tape complete albums. Thus, in this section we will separately consider the 20.7 million people (11% of the population) who have copied at least one complete album and the 28.2 million people (15% of the population) who have copied at least one selection during the survey year. For ease of presentation, we will first describe complete album tapers, then individual selection tapers, and where warranted, we will point to important differences between these two types of tapers. *Generally speaking, however, it will be seen that the vast majority of taping is done by those between 20 and 34 years of age, with at least a high school education, and above average family incomes.*

A. Taping as a Function of Age

Table 13 shows the percent of the total U.S. population age 10 and over as well as the percent of all album and all selection tapers falling into each of three age groups. In addition, it shows the percent of all home taped albums and selections that were taped by each of these age groups.

Complete Album Taping. Consistent with expectations, Table 13 shows that there is a strong relationship between complete album taping and age with teenagers and young adults (from 20 to 34 years of age) being more likely to tape albums than those over 35. Moreover, although not shown in the table, only 2% of all complete album tapers are 55 years of age or older. Note, however, that while teenagers are more likely to be album tapers than would be expected on the basis of their representation in the total population (i.e., teens are 21% of the population but 30% of all complete album tapers), they account for a surprisingly small 12% of home taped album units. In contrast, it can be seen that complete album taping is predominantly an activity of young adults: 20 to 34 year olds are 30% of the population yet comprise 50% of all album tapers. More important, this 20 to 34 year old age group has copied 69% of all taped album units. Finally, it is important to realize that *older tapers* (i.e., those over 35) actually account for more copies of complete albums (19%) than do teenagers (12%).

Selection Taping. In Table 13, it can be seen that the data concerning the taping of selections closely parallel those found with respect to complete album taping, with 20 to 34 year olds again being the most prolific tapers. Once more, however, it is important to note that while teens comprise a large 34% of selection tapers, they account for a surprisingly small 22% of taped selection units. In fact, they account for the same percent of copied selections as do those 35 years old and older.

To summarize briefly, most home taping is done by people between 20 and 34 years of age. While teenagers represent a disproportionately large percent of tapers, they account for a surprisingly small percent of the complete albums and selections that are copied. Moreover, although a disproportionately small percent of tapers are over 35, *these older tapers* comprise 20% of complete album tapers and an even larger 25% of selection tapers. In addition, they record about 20% of all taped units of music.

TABLE 13

Album Taping

Selection Taping

[illegible]

TABLE 14

[illegible]

		[illegible]		[illegible]	
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

B. Taping as a Function of Marital Status

Complete Album Taping. As can be seen in Table 14, there are fewer married album tapers than would be expected on the basis of their representation in the total population. People who are married are 51% of the total population, yet they comprise only 39% of all complete album tapers. Note, however, that these married album tapers account for 48% of the complete albums that are home taped. Table 14 also shows that, consistent with our previous discussion of age, never marrieds under 20 comprise a disproportionately large 29% of all album tapers, but account for only 12% of taped album units. In contrast, never marrieds over 20, who represent 12% of the population, comprise 23% of the album tapers and account for a full 30% of taped album units.

Selection Taping. Table 14 also shows that, similar to the data with respect to album taping, married people are 37% of all selection tapers. Again, however, married tapers account for almost half (49%) of the selections that are taped. In contrast, those who have never been married comprise 50% of selection tapers but account for only 41% of all taped selections.

To summarize briefly, although married people are less likely to be home tapers than those who have never been married, they account for almost half of all taped album and selection units. Moreover, while never marrieds over 20 account for almost 3 times as many complete albums as those under 20, never marrieds over 20 account for approximately the same percent of selections as those under 20.

TABLE 15

Taping as a Function of Race and Sex

		Album Taping		Selection Taping	
	Percent of U.S. Population Over 10	Percent of Tapers	Percent of Units	Percent of Tapers	Percent of Units
WHITE MALES	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WHITE FEMALES	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
BLACK MALES	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
BLACK FEMALES	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

C. Taping as a Function of Race and Sex

Complete Album Taping. It can be seen in Table 15 Col. 2 that males are more likely to be album tapers than females: almost 7 out of every 10 complete album copies are taped by males. More specifically, males are 48% (43 + 5) of the total U.S. population, but they are 62% of all complete album tapers and they account for 69% of all taped album units. Table 15 also shows that, unlike sex, race is unrelated to album taping. Just as Blacks are 11% of the population, they are 12% of all album tapers and they account for 11% of album units.

Selection Taping. In contrast to the findings concerning album taping, males are only slightly more likely to be selection tapers than are females. In fact, females comprise 47% (42 + 5) of all selection tapers and account for 48% of all taped selections. Table 15 also shows that, similar to album taping, race is unrelated to selection taping.

TABLE 16

[illegible]

D. Taping as a Function of Education

Complete Album Taping. Table 16 shows that students are 22% of the population. At the same time, they comprise 38% of all album tapers and they account for 30% of taped album units. While this latter percentage is high relative to their representation in the total population, it is low relative to their representation among album tapers. A consideration of nonstudents shows a strong relationship between album taping and education. More specifically, Table 16 shows that the more education people have, the more likely they are to be complete album tapers *and* the more complete albums they will tape.

Selection Taping. Similar to album taping, Table 16 shows that students are more likely to be selection tapers than would be expected on the basis of their representation in the total population. Again, however, note that while students comprise a disproportionately high 42% of selection tapers, they account for only 34% of taped selection units.

Table 16 shows that, similar to album taping, people with high education are more likely to be selection tapers than people with low education. However, in contrast to the findings concerning album taping, the better educated a selection taper is, the smaller the amount of selection taping he or she does. That is, while only 9% of selection tapers have less than a high school education, these tapers account for 14% of all taped selections. In contrast, although 29% of selection tapers have had at least some college education, these tapers account for only 28% of all taped selection units.

To summarize briefly, the more education a person has, the more likely he or she is to be a taper. However, once that person is a taper, and the higher that person's education, the more albums and the fewer selections he or she will copy.

TABLE 17

[illegible]

		Album Taping		Selection Taping	
	Percentage of Total Population (Over 10)	Percent of Tapers	Percent of Units	Percent of Tapers	Percent of Units
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

E. Family Taping as a Function of Income

Complete Album Taping. It can be seen in Table 17 that although income is strongly related to album taping, the relationship is rather complex. It is clear that people from low income families (i.e., families with incomes below $10,000) comprise a disproportionately small 18% of complete album tapers and account for only 11% of all copied albums. In marked contrast, the 29% of the population in the middle income group comprise 42% of the album tapers and account for more than half (51%) of the complete albums that are taped. People from upper income families (i.e., families earning more than $20,000 per year) also engage in a substantial amount of complete album taping. Although only 32% of the population, those in the high income group comprise 40% of album tapers and account for 38% of taped album units.

Selection Taping. Similar to our previous findings with respect to education, Table 17 shows that there is a positive relationship between family income and the likelihood that one will be a selection taper. That is, the higher one's family income, the more likely he or she is to be a selection taper. In marked contrast to our findings with respect to complete album tapers, selection tapers in the middle income group account for a disproportionately small 23% of taped selection units. Note, too, that people from upper income families comprise 43% of all selection tapers and account for almost half (49%) of all copied selections.

To summarize, home taping is least likely to occur in low income families. Moreover, while those from middle income families tape 51% of the complete albums that are copied, those from upper income families account for an additional 38% of taped album units and almost half of all selection taping. Thus, despite arguments to the contrary, the economically disadvantaged do not engage in large amounts of home taping in order to bring music into their homes. If anything, a disproportionately large amount of home taping is done by those in the highest income group.

Findings
Part V
Other Characteristics of Album and/or Selection Tapers

In addition to describing their buying of blank audio tape and their taping behavior, all respondents also answered questions about their buying of records and prerecorded tapes as well as questions about their interest in and concern with music.

In this section we will see that album and/or selection tapers are not only more likely to be buyers of records and prerecorded tapes than are nontapers, but they also spend more money on prerecorded product than do the nontapers. More importantly this relationship between taping and buying is largely a reflection of a more general commitment to music. Viewed from this perspective, home taping of albums and selections provides an alternate way of adding to one's *recorded* music collection. Thus, it is reasonable to conclude that if home taping were not possible, these album and/or selection tapers would be spending more on prerecorded product.

For ease of presentation, in the remainder of this section the term Taper will refer to those respondents who taped complete albums and/or individual selections. Those who have not engaged in this type of taping (even though they may have done other types of taping) will be referred to as Nontapers.

TABLE 18

Tapers and Buyers of Prerecorded Music

	Percent of Total Population Over 10	Percent of Tapers	Percent of Nontapers	Percent of Buyers	Percent of Total Prerecorded Dollars
TAPERS WHO ARE BUYERS	16%	[illegible]	—	[illegible]	[illegible]
TAPERS WHO ARE NONBUYERS	3	18	—	—	—
NONTAPERS WHO ARE BUYERS	35	—	44	[illegible]	[illegible]
NONTAPERS WHO ARE NONBUYERS	46	—	56	—	—
	100%	100%	[illegible]	[illegible]	[illegible]

A. Tapers and Buyers

In addition to being asked about their taping behavior, all respondents were asked whether they were current buyers: that is, whether they had purchased a record or prerecorded tape, either for their own use or to give to someone else, in the survey year. Table 18 shows the percent of the total U.S. population age 10 and over (1) who engage in both taping and buying, (2) who tape albums and/or selections but do not buy, (3) who buy prerecorded product but do not tape, and (4) who neither tape nor buy. It can be seen that in comparison to the 19% of the population (16 + 3) who taped at least one complete album and/or selection during the survey year, fully 51% of the population (16 + 35) bought at least one record or prerecorded tape during this time period. Table 18 also shows that 82% of tapers are current buyers of records and prerecorded tapes. In contrast, only 44% of the nontapers are current buyers.

Current buyers were asked to indicate the amount of money they had spent on records and prerecorded tapes during the survey year. In addition to showing the percent of the buyers who are and are not tapers, Table 18 shows the percent of the total dollars spent on records and prerecorded tapes accounted for by these two groups. Note that although only 31% of buyers are tapers, these buyers account for almost half (48%) of the total dollars spent on prerecorded music. In sum, Table 18 shows that tapers are not only more likely than nontapers to be current buyers of records and prerecorded tapes, but on the average, tapers spend more money on prerecorded music than do nontapers.

[redacted]

B. Perceived Value of Prerecorded Music

We saw earlier that album and/or selection tapers tape most frequently to avoid buying prerecorded product. As we will see, however, this does not mean that tapers perceive records and prerecorded tapes as "bad value for money".

All respondents were asked to indicate the degree to which they felt that "in comparison to other forms of home entertainment" records and prerecorded tapes were a "good" or "bad" value for the money. Table 19 shows how each of the four buying/taping groups (described in Table 18) as well as all tapers and all nontapers responded to this question. It can be seen that tapers (82%) are more likely to perceive prerecorded product as "good value for money" than are nontapers (64%). Somewhat surprisingly, fully 74% of the tapers who are nonbuyers acknowledge that records and prerecorded tapes are "good value for the money." It is also interesting to note that those who both tape and buy (83%) are as likely to perceive records and prerecorded tapes as "good value" as are those who buy but do not tape (81%). Thus, although tapers tape to avoid buying they do not do so because they think prerecorded music is bad value for the money.

C. Relative Expense of Taping vs. Buying

All respondents were asked whether they believed that taping was less expensive than buying. More specifically, they were asked to "agree" or "disagree" with the following statement: "Buying records and prerecorded tapes for my own use in the next twelve months is more expensive than making my own tape recordings." Not surprisingly, Table 20 shows that tapers were much more likely to agree with this statement (68%) than were nontapers (39%). What is somewhat surprising, however, is the finding that tapers who do buy are almost as likely to agree with this statement (68%) as are those who do not buy (70%).

TABLE 20

[illegible]

	[illegible]			[illegible]		
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TABLE 21

Perceived Importance of Music

	Tapers			Nontapers		
	Percent of All Tapers	Percent of Tapers Who are Buyers (Both)	Percent of Tapers Who are Nonbuyers (Tape Only)	Percent of All Nontapers	Percent of Nontapers Who are Buyers (Buy Only)	Percent of Nontapers Who are Nonbuyers (Neither)
VERY IMPORTANT	51%	56%	33%	31%	39%	[illegible]
IMPORTANT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEITHER	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
UNIMPORTANT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

D. Perceived Importance of Music

We asked all respondents to indicate the degree to which they felt music, and in particular prerecorded music, was important to them. More specifically, respondents were first asked: "Generally speaking, how important is music to you?" Then they were asked, "Generally speaking, how important is *prerecorded* music to you?"

In Table 21 it can be seen that, in contrast to the 51% of all tapers who reported that music is "very important" to them, only 31% of nontapers gave this response. More significantly, tapers who are buyers are by far the most likely to perceive music as very important [illegible] them (56%). In contrast, only 39% of those [illegible] buy but do not tape, and only 33% of those [illegible] tape but do not buy, view music as very [illegible]portant.

TABLE 22

[illegible]

	[illegible]			[illegible]		
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Table 22 shows a very similar pattern of results with respect to *prerecorded* music. That is, tapers are more likely than are nontapers to perceive prerecorded music as "very important" to them (32% vs. 18%). Here too, those who both tape and buy were more likely to perceive prerecorded music as very important (35%) than are those who only buy (27%) or who only tape (17%). These findings suggest that buying and taping both reflect a more general commitment to music. That is, the more one sees music as important, the more likely one is to engage in both buying and taping. We shall return to this point below.

TABLE 23

[illegible]

	[illegible]			[illegible]		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[illegible]

E. Perceiving Oneself as Knowledgeable About Prerecorded Music

To determine how knowledgeable about prerecorded music our respondents thought they were, we asked the following question: "How do you think that people would describe you as a source of information about records and prerecorded tapes? Would they describe you as: (1) one of the best sources, (2) a good source, (3) an average source, or (4) a poor source?" Table 23 shows that more tapers than nontapers perceived themselves as knowledgeable about records and prerecorded tapes. Specifically, 36% of tapers but only 11% of nontapers said they were "a good" or "one of the best" sources of information. Once again, however, those who both tape and buy are more likely to see themselves as "a good" or "one of the best" sources (38%) than are those who only tape (20%) or only buy (18%), with these latter two groups perceiving themselves as better informed than those who neither tape nor buy (5%).

It is one thing to be informed, but still another to share this information. Thus, we also asked our respondents, "How often do other people talk to you about records and prerecorded tapes? Would you say they talk to you: (1) frequently; (2) occasionally; (3) rarely; or (4) never." In Table 24 the same pattern of responses can again be seen. That is, more tapers (35%) than nontapers (11%) said they were frequently asked about music. Further, compared to only 6% of those who neither tape nor buy, fully 38% of those who both tape and buy reported that others frequently talked to them about records and prerecorded tapes.

TABLE 24

[illegible]

F. Interest in Music

All respondents were asked whether they considered themselves to be "a collector of records and prerecorded tapes." Table 25 shows that, in contrast to 51% of tapers, only 17% of nontapers saw themselves as collectors. Again, however, note that those who are both tapers and buyers are most likely to view themselves as collectors.

TABLE 25

Interest in Music

	Tapers			Nontapers		
	Percent of All Tapers	Percent of Tapers Who are Buyers (Both)	Percent of Tapers Who are Nonbuyers (Tape Only)	Percent of All Nontapers	Percent of Nontapers Who are Buyers (Buy Only)	Percent of Nontapers Who are Nonbuyers (Neither)
Consider Themselves Collectors	51%	58%	30%	17%	29%	6%
Attend Live Performances	55	59	34	30	44	19
Read Features or Reviews	62	64	54	36	55	22
Prefer Records or Prerecorded Tapes as Gifts	74	78	60	40	56	28

To investigate further the extent to which respondents were committed to or interested in music, we asked three additional questions concerning attendance at live performances, reading of articles and reviews, and preferences for a gift. More specifically, all respondents were asked if they had gone to see an artist or group perform at a concert, club or bar within the past 12 months. In addition, they were asked if they usually read features or other stories about recording artists and/or record or tape reviews in newspapers and magazines. Finally, they were asked to indicate which of the following they would most like to receive as a gift: a book, a game or toy, a record or prerecorded tape, candy, or flowers.

Table 25 shows the percent of the people in each of the different taping and buying groups who attend live performances, read about music and would most prefer to receive a record or prerecorded tape as a gift. It can be seen that the pattern of responses to these three questions is very similar to the pattern obtained with respect to questions concerning importance of, knowledge about, and being a collector of music. That is, in all three cases, tapers indicate a greater interest in music than do nontapers. Moreover, in all three cases, the people who appear most interested in music are those who buy as well as tape.

To summarize, this section of the report has shown that, in comparison to nontapers, tapers are more knowledgeable about music, see it as more important, and are more likely to perceive themselves as collectors. Moreover, we have seen that this is particularly true of people who are both tapers and buyers. These findings imply that, although related, taping and buying may best be seen as independent ways of expressing a more general, underlying commitment to music. In fact, the data clearly indicate that the stronger this commitment, the more likely one is to both tape and buy prerecorded music and to engage in a variety of other behaviors that also express this commitment to and interest in music. These findings imply that, were home taping not possible, tapers, and in particular, those tapers who are already buyers, would spend additional amounts of money on records and prerecorded tapes.

Summary and Conclusions

At a time when demographic and other market analyses point to growth, there has actually been a decrease in the percent of the U.S. population who are buyers of records and prerecorded tapes. In marked contrast, the percent of the population buying blank audio tapes and engaging in home taping has significantly increased. In fact, between 1977 and 1980, 6.6 million people purchased a blank audio tape for the first time. Clearly, not all blank tape is used to record music, and not all tapers are music tapers. Nevertheless, during the 1980 survey year, our data show that fully 75% of all blank tapes purchased were ultimately used to record music, and 7 out of every 10 tapers made at least one music recording. More precisely, during the 1980 survey year, some 39 million people used over $600 million worth of blank audio tape to copy *all* music or other professional entertainment.

More important, over 93% of these music tapers readily acknowledge that they are copying music that is available in *prerecorded* form. That is, over 36 million people report that they are copying complete albums and/or individual selections or excerpts from albums. These 36 million album and/or selection tapers copied 251 million complete albums and 2044 million individual selections. A conservative estimate places the value of this recorded music at more than $2.85 billion.

Although there are important differences between album and selection tapers (e.g., complete album tapers are predominantly male while selection tapers are almost as likely to be female as male), both album and selection tapers tend to be well educated young adults (between 20 and 34 years of age) with high family incomes. Thus, in contrast to expectations, neither teenagers nor the economically disadvantaged are "heavy" home tapers.

In addition to these demographic characteristics, album and/or selection tapers also have something else in common – a deep, underlying commitment to music. Music is not only very important to them, but they perceive themselves as being quite knowledgeable about, and collectors of, prerecorded music. They read record and tape reviews as well as feature stories about recording artists, and they attend concerts and other live performances. It is thus not surprising to find that these album and/or selection tapers are also buyers of prerecorded music.

To a large extent, taping parallels buying in that consumers tend to tape the same types of music that they buy. The majority of their taping is from borrowed materials and broadcast performances rather than from their own collections. The most frequent reason they give for taping is "so I don't have to buy it."

Although we recognize that the "true" consumers of music will continue to buy records and prerecorded tapes even while they add to their music collections via home taping, we must again emphasize that this "does not imply that 'home tapers' would not spend even more money on prerecorded music if tape recorders did not exist."[1]

---

[1] Kapp & Fishbein, 1978, p. 22

We have seen that both taping and buying are expressions of a more fundamental commitment to and interest in music. The more interested and involved people are in music, the more they are motivated to hear "what they want, when they want, without commercial interruption." That is, the more they are motivated to personally own a copy of a piece of music. At the present time, there are only two ways to own such a personal copy: one can either purchase it in prerecorded form or one can make a tape recording.

It should be clear that many people use at least some part of their discretionary income to bring *recorded* music and other professional entertainment into their homes. Prior to the introduction of relatively inexpensive home audio recording equipment, a personal copy of a recording could be obtained only by purchasing a record or prerecorded tape. That is, all discretionary income for the purpose of bringing personal copies of music into the home was used to purchase prerecorded product. Now there is an alternate method. It can be argued that all money spent on blank audio tape *for the purpose of recording music or other professional entertainment* would have been spent on prerecorded products were home taping not possible. As we saw earlier, consumers spent $609 million for this purpose during the survey year. Thus, we believe that, *at the very least,* consumers would have spent this $609 million on prerecorded product had they been unable to home tape.

Note that this is a very conservative estimate of the additional amount of money that would have been spent on prerecorded product. For example, assume that a person records two complete albums on one blank tape. If the person could only obtain these recordings by purchasing them in prerecorded form, his or her cost would have been \$12.54 (\$6.27/album). The discretionary income argument does *not* assume that the person would have spent \$12.54 on records if home taping were not possible. Rather, it assumes that only the money *actually spent* on blank tape (e.g., about \$2.00) would have been used to buy prerecorded product. That is, it assumes that a consumer will spend exactly the same amount of money (or will use the same proportion of his or her discretionary income) to bring recorded product into the home, whether this is done through the purchase of records and prerecorded tapes or by purchasing blank tapes.

Although we do not believe that every album or selection that is copied is a "lost sale" to the industry, we do believe that *all* copying infringes upon the lawful and legitimate rights of the copyright owners. Irrespective of the question of "lost sales," or any other consideration for that matter, it must be realized that every time a complete album or selection is taped, the taper is reproducing a copywritten work in its entirety without providing fair and equitable compensation to the copyright owners. As we have shown, these infringements result in the home taping of music and other professional entertainment valued at more than $2.85 billion.

Clearly these infringements of copyrights deprive artists, musicians, publishers, songwriters, producers and recording companies of fair and reasonable royalties. Not only does home taping reduce the copyright owners' legitimate earnings, but this loss in revenue has many other serious consequences. Not many recordings have commercial success, in fact, during the 1980 survey year, of albums published, only 17% of popular albums and an even smaller 6% of classical albums reached the "break even" point.[1] Thus, the few recordings that are financially successful virtually underwrite most of the recorded music that is made available to the U.S. population. Yet, to a large extent, it is precisely these financially successful recordings that are being home taped. Thus the effects of home taping on the industry go well beyond the dollar loss due to copyright infringement. When a recording company does not receive equitable compensation and, in particular, equitable compensation for its "hits," it loses much of its ability to risk failure: there are fewer funds available to develop new artists, to experiment with new types of music, or to produce classical, jazz, ethnic, folk or other recordings that appeal to special audiences.

[1] Cambridge Research Institute, *Economic Study of the Recording Industry* for the Section 115 Rate-Making Proceeding before the Copyright Royalty Tribunal, April 7, 1980

Based on our findings concerning the nature and extent of home taping of prerecorded music and other professional entertainment, we at WCI strongly believe that without fair and equitable compensation to copyright owners, home taping is incompatible with a healthy prerecorded music industry. We have seen that over $2.85 billion worth of music is home taped and that the creative forces in the industry receive absolutely no compensation for their creative work. It is very clear that this copying is harmful to the industry. Not only do tapers most frequently copy to avoid buying, but the bulk of what is copied comes from borrowed materials and broadcast performance. In fact, we have seen that, at the very least, an additional $609 million would have been spent on prerecorded music had home taping not been possible.

We believe that for our industry to remain healthy the artists, publishers, composers, producers, authors, musicians, and recording companies must be fairly and equitably compensated for their labours. Thus, WCI strongly supports the efforts of all members of the industry to place a fair and reasonable "royalty" on the sale of home taping equipment and blank audio tapes. We believe that this procedure provides a way for the U.S. public to continue to take advantage of technological advances in home sound recording and, at the same time, it provides equitable compensation to those whose works are being copied.

Appendix

Sample Design

The sample design can be described as a customized multistage stratified area probability sample encompassing the universe of all private households in the conterminous United States.

National Analysts' basic sample design consists of three levels of stratification. This was accomplished by grouping all housing units in the United States, as given in the 1970 Census of Population and Housing and the corrections therein, into a two-way model. This stratification contains two levels – type of population (urbanization), and geographic divisions. Three types of population and nine geographic divisions were defined. The third level of stratification was carried out within each of the 3 x 9 strata cells formed by the two-way model.

In setting up the strata, the 3,103 counties and independent cities which comprise the total land area of the United States were stratified by "type" of population, either metropolitan or non-metropolitan areas. Each of the resulting 243 metropolitan areas of the United States was then divided into two parts, central cities and the remainder of the metropolitan area. The non-metropolitan population was put into a third class. The three types of populations (zones) follow definitions from the 1970 Census of Population and Housing, and are:

Zone I: The area comprised of the central city(ies) in metropolitan areas (a central city is a city named in the metropolitan area title).

Zone II: Suburban – that area in standard metropolitan statistical areas (SMSA) outside Zone I [central city(ies)].

Zone III: Non-metropolitan areas.

The level of stratification that is based on Census geographic divisions and regions was accomplished by classifying every private household in the conterminous United States into one of the nine Census divisions. Within each division, parts of the metropolitan areas, central cities or "suburbia" were ordered geographically and/or by size. In the non-metropolitan zone, states were ordered geographically and, within each state, groups of state economic areas were ordered. This array provided the sampling frame such that 114 strata of approximately equal size could be identified by legal or Census boundaries. The average stratum size is approximately 600,000 housing units.

Stratification and Selection of the Metropolitan Primary Sampling Units

That part of metropolitan areas defined as central cities were formed into 38 strata. This was accomplished by grouping together within strata central cities which are alike in either size or geographical proximity. Some strata contain only one central city.

Primary sampling units (central cities) were given measures of size based on the 1970 Census housing counts. One city sampling unit was selected from each stratum with the chance of selection of any city unit being proportional to its 1970 housing units.

A book of random numbers was used to select a number between "one" and the stratum number of housing units. This gives each number between "one" and the stratum total number of housing units an equal chance of being selected. This same procedure was followed for each stratum. The probability of any central city within the stratum being selected is the quotient of its 1970 housing units and the total of the 1970 housing units within the strata. In the stratum where Worcester, Mass., was selected, for example, the size of the city of Worcester is 58,589 housing units. The stratum size is 574,259 housing units. If we divide this into 58,589 the result is a probability of selection of .10202.

In Zone II the remaining portions of each of the 243 metropolitan areas ("suburbia" – that area outside of central cities) were grouped into 39 strata. This grouping was done by placing in the same strata, counties that are in the same geographic area. A primary sampling unit in Zone II is a metropolitan county or that part of a metropolitan county less the central city if it contains only one county. The size of the primary sampling unit is the number of 1970 housing units in the county, or the county less the central city if it contains one county. The size of each of the 39 strata is the sum of the housing units of all the primary sampling units it contains. Again, the book of random numbers was used to select one primary sampling unit from each stratum.

Stratification and Selection of the non-Metropolitan Areas

In Zone III, the counties of the United States defined as non-metropolitan in the 1970 Census were grouped into 37 strata, following the Census divisions and states within. State economic areas were used to form these 37 strata.

A Primary Sampling Unit in Zone III is one or more counties. The reason for having more than one county in some PSU's is that a minimum county size of 10,000 housing units was established for each PSU. We believe that any county of less than 10,000 housing units is quite homogeneous. All counties with less than 10,000 1970 housing units were combined with an adjacent county to form a PSU of two or more counties. This was done before any selection of PSU's was made.

The size of each of the 37 strata is the total of all the counties it contains. A book of random numbers was used to select 37 primary sampling units proportional to the 1970 housing units in the primary sampling unit.

Sample Size

The sample design was drawn to yield a disproportionate sample with fixed sample sizes in each of 48 cells (12 age cells, 2 sex cells, and 2 race cells: black and non-black) in 1977, and 96 cells (8 age cells, 2 sex cells, 2 race cells and 3 buying cells) in 1980.

In 1977 a total of 8,145 households were drawn into the sample and in 1980 a total of 8,766 households were drawn into the sample and by sub-sampling certain age, sex and race cells, the sample yielded the number of interviews shown in Attachment A and Attachment B by the domains of interest. The elimination of certain eligible households was necessary to yield a specified number of interviews in each of the 48 cells in 1977 and 96 cells in 1980.

In 1977, 452 area segments and in 1980, 458 area segments were selected into the sample. Disproportionate sampling of segments was incorporated to oversample black households in the population.

Weighting Model

Since the sample design was disproportionate in nature, statistical weighting was necessary to attain a threefold objective. The weighting process served:

- To put the sample back in balance due to disproportionate sampling of segments.
- To adjust for non-response within each segment area.
- To present meaningful estimates to known U.S. Census data.

The weighting was accomplished in three stages utilizing both the screening data for all households contacted and the interview data.

A. First Stage

The first stage of the weighting model is an adjustment in each segment area for both disproportionate selection of households and non-response. From the data on completed household screenings, an estimate was made for each segment area of the number of households that should have been screened in each segment with a balance or self-weighting sample of segments. This was done by adjusting the number of sample households for vacant dwelling units and the increase or decrease in households since the 1970 model. The screened households were then weighted up to the estimate of total occupied sample households in each segment. At the end result of this stage was an adjustment in each segment area for non-response.

This same first stage weighting procedure was utilized for the number of completed interviews in each segment area. This was achieved by adjusting the number of interview households for vacant dwelling units and non-response and then weighting the interview households up to the estimate of total occupied sample households in each segment.

B. Second Stage

The second stage of the weighting model is based upon the record and tape buying status of all individuals screened in the study, regardless of whether or not they were interviewed. The procedure was to tabulate the weighted screening form data by buying status in each of the 48 age, sex and race cells. In 1977 this resulted in a 192 cell matrix (12 age cells x 2 sex cells x 2 race cells x 4 buying status cells – never buyer, bought within the past year, bought between 1 and 5 years ago, and bought more than 5 years ago). In 1980 this resulted in a 144 cell matrix (12 age cells x 2 sex cells x 2 race cells x 3 buying status cells – buyers, nonbuyers/tapers, and nonbuyers).

Census estimates were obtained for each of the age, sex and race cells. The buying status in both 1977 and 1980 within each of the 48 cells was used to make a ratio estimate to the Census estimate for each of the 192 cells in 1977 and 144 cells in 1980. This yielded the buying status estimate within each of the 192 cells and 144 cells as representing totals to the U.S. population.

This total derived for each of the age, sex, race and buying status cells was used as a weighting model for the 3,385 interviews in 1977 and the 2,370 interviews in 1980.

Each interview was put into one of these 192 cells in 1977 and 144 cells in 1980 as reported for that respondent on the screening form.

C. Third Stage

The first stage weight was cumulated for all interviews within a cell. A constant weight was given each interview within a cell so that the product of both weights, summed for all interviews, within a cell, equaled the previous developed cell total as outlined in second stage weighting.

COMPLETED INTERVIEWS—AGE BY SEX BY RACE

ATTACHMENT A-1977

AGE	MALE		FEMALE	
	■	□	■	□
10-14	45	112	22	99
15-19	29	98	41	106
20-24	30	111	38	135
25-29	25	123	37	131
30-34	24	119	22	106
35-39	26	112	32	110
40-44	26	97	25	93
45-49	25	99	27	102
50-54	24	111	23	113
55-59	29	104	23	114
60-64	30	100	25	142
65+	22	117	30	149
Subtotal	335	1,303	345	1,402
Total	3,385			

ATTACHMENT B-1980

AGE	MALE		FEMALE	
	■	□	■	□
10-14	37	109	32	113
15-19	47	132	41	114
20-24	27	126	42	144
25-29	25	116	37	118
30-34	22	99	19	111
35-44	16	96	33	132
45-54	26	92	42	116
55+	20	137	33	116
Subtotal	220	907	279	964
Total	2,370			

■ NON-WHITE □ WHITE

3

CRT COPYRIGHT ROYALTY TRIBUNAL
UNITED STATES OF AMERICA

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COMMISSIONERS:
Thomas C. Brennan
Douglas E. Coulter
Mary Lou Burg
Clarence L. James, Jr.
Frances Garcia

November, 1979

The Copyright Royalty Tribunal today is releasing the results of a survey of home taping of audio works and related matters conducted by William R. Hamilton and Staff as the first phase of the Tribunal's study of home taping of copyrighted materials.

Attached is a summary report prepared by the Hamilton firm, and a report of the Tribunal's Home Taping Committee. These documents do not necessarily represent the views of the Tribunal. Additional materials are available for reading or copying in the offices of the Tribunal. These include the master questionnaire, a tabular report of the survey data, and demographic data.

A SURVEY OF
HOUSEHOLDS WITH
TAPE PLAYBACK EQUIPMENT

Prepared for:
COPYRIGHT ROYALTY TRIBUNAL

September 1979
Job 714

WILLIAM R. HAMILTON & STAFF
4000 Albemarle Street, N.W.
Washington, D.C. 20016

I

METHODOLOGY

The data described in this report represent a national sample of households with at least one piece of equipment capable of playing back magnetic tape either in the home or in the car. Three types of tape playback equipment were considered: eight-track, cassette, or reel-to-reel machine.

The sample was drawn for H&S by Survey Sampling, Inc. Respondents 14 years of age or older were eligible for interviewing. The nationwide sample consists of 1500 people over 14 years of age; 39 additional teenagers (14-19 years of age) were also interviewed to reach a stipulated quota of 500 teenagers. The nationwide results do not include the extra 39 teenagers. Priority in respondent selection within a household was given first to teenagers to reach the quota, then to the youngest adults in the household to avoid oversampling older people, a problem inherent in telephone surveys. Men and women were sought and interviewed on an equal basis.

A Description of the Sample

Previous studies of the prerecorded music market have indicated that the buying population of prerecorded music is considerably younger than the national population. H&S' sample selection was designed with this in mind. Nationally, people under 35 years of age account for 46% of the population 14 years of age or older. In a prerecorded music buyers survey the figure is 65% for the 14-34 age group and in H&S' sample of households with tape players, 69% of the respondents fall into that age group.

The total family income distribution is fairly broad. Of the 75% who disclosed their total family income, 16% are under $12,000 a year and 13% have annual incomes over $30,000. Forty-six (46%) have annual incomes between $12,000 and $30,000.

Most of the heads of households with playback equipment are at least high school graduates; only 13% have less than a high school degree. Thirty-one percent (31%) hold a college degree, as shown in Table 2.

II

TYPES OF PLAYBACK EQUIPMENT

The most common tape player found is eight-track, closely followed by cassette. Sixty-eight percent (68%) have eight-track players in their homes and 66% have cassette players. The cassette players are likely to be portable and have a recording capability. Ninety-three percent (93%) record and 77% are portable.

The reverse is true for eight-track players; 45% record and 38% are portable. Incidence of reel-to-reel tape deck is much lower. They are found in 19% of the households.

Eight-track tape players are also the most common playback equipment for the car. Thrity-nine percent (39%) of the households have a car with an eight-track player. Cars equipped with cassette players are found in 22% of the households.

III

RECORDING HABITS OF RESPONDENTS

Slightly less than half (47%) of the respondents have tape-recorded music or speech in the past year. Half of these people (51%) record only music, 6% record only speech, and the rest record some combination of the two.

Tape recording incidence declines with age. Among teenagers, 54% have recorded in the past year. Fifty percent (50%) of the people 20-34 years of age have recorded in the past year, while only 35% of those over 35 have done so. Incidences of tape recording in a year also rise slightly with the education and income of the head of household.

The frequency of taping music is rather low. Only 11% of all the respondents tape music at least once a week, that is 44% of the people who have taped music in the past year. Considering the people in each age group who tape music, those 20-35 are slightly more likely to tape music at least once a week than are the teenagers. If only people who tape music are considered, older people (over 50) tape almost as frequently as teenagers. Fewer older people, of course, tape music at all.

A majority of the people who tape music tape between one and five hours of music in an average month. Only 7% of all respondents tape more than ten hours of music in an average month.

For all the age groups, the majority who tape music tape between one and five hours in an average month. Teenagers and those people between 20 and 34 are more likely to tape more than ten hours in a month than are older people.

The sample can be broken into four categories to reflect frequency of taping. Over half the respondents (57%) do not tape music at all. Nineteen percent (19%) tape less than two hours in an average month. Sixteen percent (16%) record between three and ten hours in an average month. Finally, 7% are people who record more than ten hours of music in an average month, frequent music recorders.

The frequent music recorders consitute a very small percentage of people 14 or older, only 7% of the households with playback equipment. They are twice as likely to be men as women. They tend to be young; 82% are under 35 years of age, and 39% are teenagers. Their households have an income distribution similar to the playback equipment households overall.

People are more likely to do extensive taping of music from their own music sources or radio and TV than they are from borrowed sources. Among those who tape music, in an average month 12% tape more than six hours from their own collection, 12% tape more than six hours from radio and TV, and 7% tape more than six hours from borrowed records. Fifty-nine percent (59%) of those who tape music tape less than two hours a month from borrowed records.

The incidence of taping live performances is quite low. Nine percent (9%) of all respondents or 21% of those who tape music have taped a live musical performance in the past year. A majority of those who have done so in the past year have taped three or more performances.

Most taping of records involves long-playing albums. Of those who tape music, 40% tape mainly parts of albums, 35% tape mainly entire albums, and 14% tape mainly singles.

The respondents were allowed to indicate up to three types of music that they record. Rock music was by far the most common type of music taped; 60% of those who tape tape rock. Among those who tape music, the other kinds of music taped include country music (28%), disco music (23%), jazz and easy listening, each with 21%, classical music (19%), and soul music (14%). Naturally, teenagers are the greatest tapers of rock and disco, while classical music is mainly taped by those over 50.

IV

PURCHASING HABITS

Most music tapers spend between $5 and $20 in an average month on prerecorded tapes or records and purchase between one and five items. A majority of the tapers also buy between one and five blank tapes in an average month.

Among the music tapers, 32% spend between $5 and $10, 32% spend between $11 and $20 and 19% spend between $21 and $50 on prerecorded music in an average month. The frequent music tapers spend even more money on prerecorded music, 62% spend more than $10 in an average month.

Most music tapers purchase one to two albums or prerecorded tapes (42%) or three to five (26%). Seven percent (7%) purchase six to ten and 5% buy more than ten albums or prerecorded tapes in an average month. Fourteen percent (14%) do not buy any albums or prerecorded tapes.

The music tapers usually buy one or two blank tapes in an average month (40%). Twenty-six percent (26%) buy three to five blank tapes and 9% buy six to ten. Seven percent (7%) buy more than ten blank tapes and 16% do not purchase any blank tapes.

A majority (51%) of the people who tape music use a blank tape only once. Twenty-six percent (26%) use it two or three times for taping and 16% use a blank tape more than three times.

Taping music does have an impact on their purchases of prerecorded music. Seventy percent (70%) of the music tapers say they would have purchased the last record or prerecorded tape they taped if they had been unable to tape it.

The impact on total purchases of prerecorded music is unclear, however. Forty percent (40%) of the music tapers say their purchases of prerecorded music have increased since they began taping music, and 40% said it had declined.

There is some indication that frequent tapers spend more money on prerecorded music. Of those music tapers who purchase two or more blank tapes in a month, 30% spend $11 to $20 on prerecorded music and 26% spend between $21 and $50. Sixty-one percent (61%) of these people spend more than $10 on prerecorded music in an average month compared to 54% of all music tapers.

V

HOUSEHOLD TAPING

In 36% of the households, someone other than the respondent tapes music or speech. In 20% of the households, one other person tapes music. In 14% of the households two or more other people tape record music.

The respondents were asked to recall the taping behavior of other household members, which, of course, has less reliability as data than their description of their own behavior. The data on other household tapers is very similar to that from the respondents.

Fifty-six percent (56%) of the other tapers tape between one and five hours of music in an average month. Other tapers show a pattern similar to that of respondents in their sources. They spend fewer hours taping from borrowed records than they do from their own. (Many respondents could not estimate these figures, however.)

The majority of the other tapers purchase one to five records or prerecorded tapes and spend between $5 and $20 in an average month.. A majority also purchases between one and five blank tapes in average month.

Respondents' recall of the habits of people in their household who tape is close enough to the habits of the tapers who were directly interviewed to conclude that the latter group is an adequate representation of any music tapers in a given household.

VI

COMPENSATION FOR TAPING

Most of the respondents feel that compensation should be given only for prerecorded records and tapes and would oppose attaching a fee to blank tapes to compensate copyright holders.

Do you believe that composers, recording artists, and business firms who make records and tapes should:

	•receive some compensation for all copies of their works?	25
or	•receive compensation only if the records and tapes are purchased?	59
	Don't know	16
		100

Would you favor or oppose a proposal to attach a fee to the sale of blank tapes which would compensate recording artists for copies of their music?

Favor	26
Oppose	62
No opinion	12
	100

TABLE 1

AGE OF RESPONDENTS IN HOUSEHOLDS WITH PLAYBACK EQUIPMENT COMPARED TO NATIONAL FIGURES

Age	National Population, 14 and Over +	Total Sample Of Households With Playback Equipment
	%	%
14-19	15	31
20-24	12	14
25-34	19	24
35-49	21	16
50-64	19	11
65 and up	14	4
	100	100

+1977 Census estimate.

TABLE 2

CHARACTERISTICS OF HOUSEHOLDS WITH PLAYBACK EQUIPMENT

	Total Sample of Households With Playback Equipment %
Total Family Income	
Under $6,000	5
$6,000-12,000	16
$12,000-18,000	24
$18,000-24,000	23
$24,000-36,000	23
Over $36,000	9
	100
Education of Head of Household	
0-11 years	13
High school graduate	35
Business school or some college	17
College graduate	19
Graduate degree	12
Refuse	4
	100

TABLE 3

FREQUENCY OF TAPE RECORDING MUSIC: BY AGE

	Nation-wide	AGE			
	Nation-wide %	14-19 %	20-35 %	35-49 %	50 and Up %
How often music is taped:					
Several times a week	6	7	6	3	4
Once a week	5	6	5	3	3
Several times a month	12	19	11	8	9
Several times a year	19	20	21	16	13
Do not record music/Don't recall	58	48	57	70	71
	100	100	100	100	100
Total hours recorded in an average month:					
Less than an hour	6	6	6	5	6
1-2 hours	13	15	13	11	12
3-5 hours	11	15	12	5	5
6-10 hours	5	8	5	4	3
More than 10 hours	7	8	8	5	3
Do not record music/Don't recall	58	48	56	70	71
	100	100	100	100	100

TABLE 4

CHARACTERISTICS OF RESPONDENTS WHO FREQUENTLY RECORD MUSIC

	Nation Population 14 and Over	Total Sample Of Playback Equipment Owners	Frequent Music Recorders
	%	%	%
Age			
14-19	15	31	39
20-24	12	14	43
25-34	19	24	
35-49	21	16	11
50-64	19	11	7
65 and up	14	4	
Sex			
Men	47	51	65
Women	53	49	35
Household Income			
Under $17,000	35	21	28
$12,000-24,000	34	47	40
$25,000-36,000	31	23	20
Over $36,000		9	12

REPORT OF THE COMMITTEE ON HOME TAPING

1. Background

On November 23, 1977, Senator John L. McClellan, the sponsor of the legislation for general revision of the copyright law and Chairman of the Subcommittee of the Senate Committee on the Judiciary having jurisdiction in copyright matters, wrote to the Copyright Royalty Tribunal stating that one of the copyright subjects requiring "further examination is the complex of issues arising from the rapid expansion of taping machines utilizing copyrighted materials." Senator McClellan requested the Tribunal to "conduct a full study and examination of all aspects of the taping issue, and to transmit a report to the appropriate committees of the Congress, together with such legislative recommendations deemed to be advisable."

On December 1, 1977, the Tribunal adopted a motion providing for a "full study and examination of all aspects of the taping problem, such study to take into account the interest and concerns of consumers, the manufacturers of home taping equipment, creative artists, and the owners and producers of copyrighted materials." The resolution authorized the appointment of a Committee on Home Taping, which was constituted on August 24, 1978. The home taping issue was included as an agenda item at a public meeting of the Tribunal on November 9, 1978. The Taping Committee reported at that session that "the Committee has determined that the principal focus for the forseeable future should be in the area of gathering information and data as to the extent of taping, its impact on copyright owners, and its impact on other affected parties".

2. Initial Phase of Home Taping Study

The Home Taping Committee resolved that its initial activity should be directed to the home taping of audio works in the United States. The Committee ascertained that comprehensive data had not been prepared by any independent source. While some elements of the music industry had conducted limited research as to the extent and impact of taping of musical works, no industry wide data had been accumulated. Subsequent to the Tribunal's action, the National Music Publishers Association and the Recording Industry of America Association commenced such efforts. The Committee welcomes this activity, which should be of assistance in the ongoing examination of the home taping issue.

The Committee concluded that it should undertake to assemble its own body of data, which could be further developed and expanded by industry-commissioned research. The Committee decided that data should first be developed as to the practices and attitudes of consumers with audio recording equipment. After considering and discarding such methods as obtaining consumer data through the use of warranty cards, the Committee recommended that the Tribunal award a contract to a market research or polling firm to conduct a consumer survey. For the initial phase of its study, the Tribunal decided that the contract provide only for the reporting of the polling results, not for any analysis of the data, which should await comments and additional information from all interested parties.

After receiving and reviewing formal proposals, the Tribunal awarded the survey contract to William R. Hamilton and Staff of Washington, D. C. The Hamilton firm has conducted hundreds of consumer surveys for various governmental, business, labor, and political entities.

3. Survey Procedures and Methodology

The Home Taping Committee prepared a draft questionnaire to be utilized in the survey. The Hamilton firm modified the questionnaire for polling purposes and prepared a number of demographic questions.

The survey included a national sample of fifteen hundred people over fourteen years of age with audio recording equipment. The sample survey was to include at least five hundred teenagers to reflect that the buying population of prerecorded music is considerably younger than the national population. The survey was conducted by telephone interviews from August 14 through September 9, 1979.

The Hamilton firm has advised the Committee that this survey based on a national sample of 1,500 and to some extent involving "recall behavior" questions, has an error factor of 2.7%. The Hamilton firm has also advised the Committee that it did not encounter a reluctance by respondents to discuss their taping activities.

4. Hamilton Summary Report

Attached to this Committee Report is a summary prepared by William R. Hamilton and Staff of the survey results. This summary discusses the survey methodology, types of playback equipment, recording habits of respondents, music purchasing habits of respondents, household taping data, and espondents' attitudes toward compensation for home taping.

5. Major Survey Findings

The Hamilton Survey found that slightly less than half of the households with audio recording equipment made any use of the equipment during the past year. Hamilton concluded that "the frequency of taping music is rather low" that "Most taping of records involves long playing albums," and that "Rock music was by far the most common type of music taped."

Data accumulated by the Hamilton firm (but not included in the summary report) concerning the motivations of those engaged in home taping indicates that over 50% of those who responded to questions on motivation indicated that they engaged in taping for "personal convenience," including the assembling in one place of songs from different albums. Less than 20% of those engaged in taping cited "saving money" as the principal motivation.

The Hamilton firm concludes that consumers taping music does have an impact on their purchases of prerecorded music. One of the most significant findings of the study is that 70% of the music tapers "would have purchased the last record or prerecorded tape they taped if they had been unable to tape it." The data, however, also provides some support for the views expressed by manufacturers of recording equipment and blank tape that personal taping of music may stimulate a greater interest in music and may encourage the purchase of records and prerecorded tape. The study found that "40% of the music tapers say their purchases of prerecorded music have increased since they began taping music, and 40% said it had declined."

In view of the consideration being given in some European countries to the imposition of a royalty fee on the sale of blank tape, the survey inquired if the respondent would favor or oppose a proposal to attach a fee to the sale of blank tapes which would compensate those who create and produce recorded music. The question was carefully drafted to exclude any suggestion that home taping may be an infringement of copyright, or that the producers of prerecorded music may find it necessary and feasible to resort to technological obstacles to home taping if more pragmatic remedies are not implemented. In light of the exclusion of these factors, it is surprising that 26% endorsed a blank tape fee and concurred in the statement that "composers, recording artists, and business firms who make records and tapes should receive some compensation for all copies of their works." It is obvious that the affirmative response would have been larger if other factors had been injected into the question.

C. General Considerations

The Home Taping Committee wishes to emphasize that its examination of this issue remains in a preliminary phase. The Committee recommended that the Tribunal publish the polling results at this time to provide a starting point for a further study of the issue, including analysis of the survey data and the submission of relevant information by all interested parties. It would be irresponsible for the Committee and others to draw any conclusions on this issue merely on the basis of the raw survey data. This consumer survey must be regarded as only the first step in an ongoing process.

In addition to further refinement and development of the subjects explored in the survey (including appropriate projections from the data), a number of other areas must be examined before any valid conclusions may be reached or policy recommendations formulated. Among these subjects would be examination of the trends in the sale of blank tape, consideration of the sales volume, prices and revenues of the prerecorded music industry, the impact of home taping on the creation and production of new product, the status of technological developments which could alter the ability to engage in home taping, and economic and population trends which could influence the extent of personal taping.

The Tribunal obviously has no function in determining whether home taping for personal use is permissible under existing legislation. Indeed, the resolution of that issue is not directly relevant to the Tribunal's activity. For as Chairman McClellan stated in his request for a Tribunal study of this subject, "it is clear that a judicial decision may not necessarily provide a just and practical solution." Senator McClellan's observation somewhat anticipated the language of the trial judge in the recent case of Universal City Studios Inc. v. Sony Corporation of America concerning the use of video tape recorders for personal taping. The judge wrote in his opinion that "A Court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the video tape recorder." The trial judge also quoted with approval from the language of the U.S. Court of Claims in the Williams and Wilkins case in which that Court, speaking of library photocopying, said that "The choices involve economic, social and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic and legislatures, not courts, can and should fashion."

The Congress, in determining national policy concerning the reproduction of copyrighted materials by libraries and for classroom instructional purposes, considered and sought to balance the interests of both the creators and users of copyrighted materials. The Committee believes that such an approach is also appropriate for the significant policy issues presented by the use of audio and video recorders for personal taping of copyrighted materials.

4

BLANK TAPE BUYERS

Their Attitudes and Impact on Pre-Recorded Music Sales

CBS
RECORDS
MARKET RESEARCH

Fall, 1980

Introduction

The purpose of this presentation is to provide information on blank tape buyers' purchases and preferences.

These data come from CBS Records' on-going research programs and custom-designed surveys.

Sources

National Surveys

7,500 interviews with record and tape buyers in March, July, November, 1979

Mail Survey

1,000 interviews with blank tapers during 1979, completed March, 1980

In-Store Survey

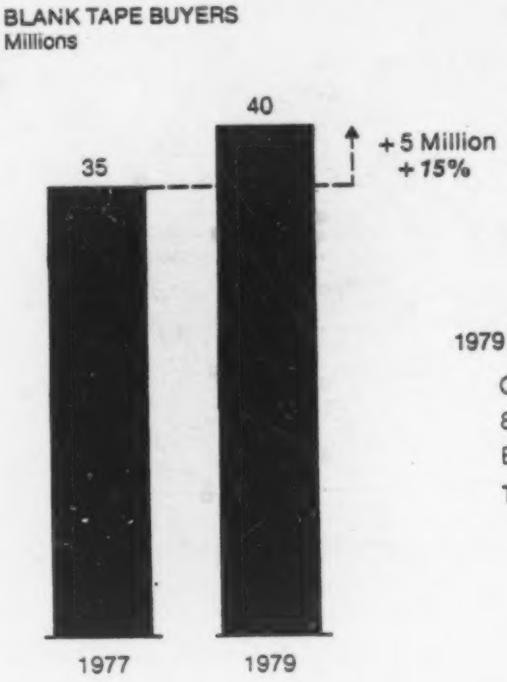
1,000 interviews in high volume tape outlets in ten major markets, June 1980

In-store Survey Cities . . .

Atlanta
Boston
Chicago
Cleveland
Dallas
Denver
Los Angeles
New York
Philadelphia
Seattle

Blank tape activity continues to increase

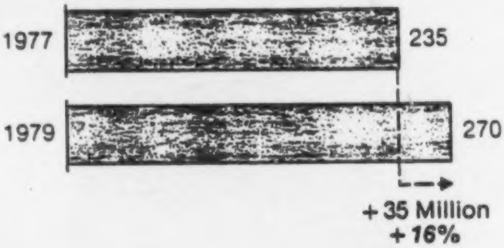
Blank tape buyers increased 15% in three years . . .



1979 Blank Tape Buyers

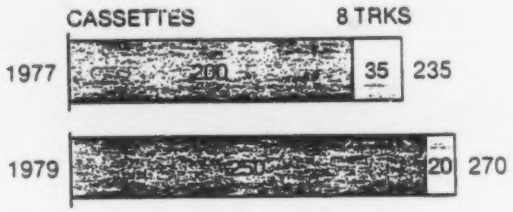
Cassette	27
8 Track	11
Both	2
Total	40

Blank tape purchases increased 16%. . .



BLANK TAPE PURCHASES
Millions

Blank cassettes are the leading configuration. . .

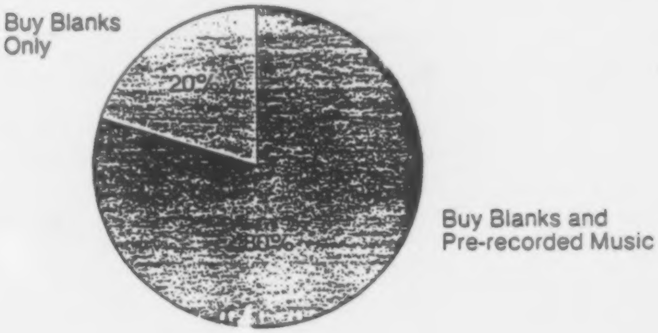


BLANK TAPE PURCHASES
Millions

Blank tapes are part of the overall music market . . .

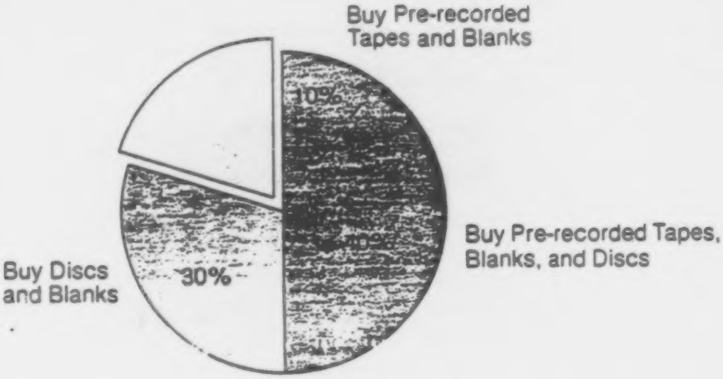
The majority of blank tape buyers purchase pre-recorded music as well . . .

BLANK TAPE BUYERS
40 Million



In fact, half buy pre-recorded tapes in addition to blank tapes . . .

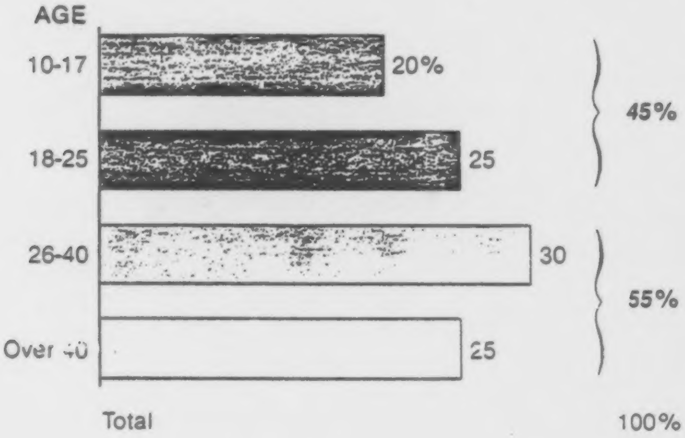
BLANK TAPE BUYERS
40 Million



The profile of blank tape buyers is broad

Almost half of blank tape buyers are under 25. . .

BLANK TAPE BUYERS
40 Million



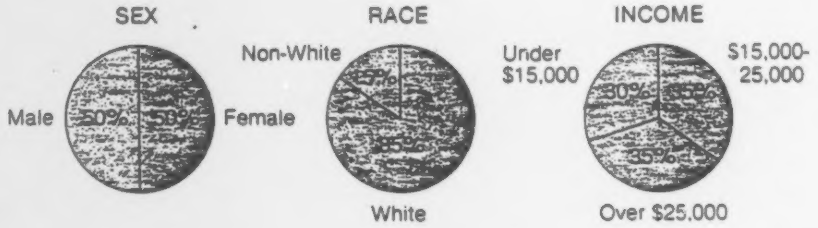
The heaviest buyers are 26-40 . . .

BLANK TAPE BUYERS

AGE	Millions of Tapers	Millions of Blank Tapes
10-17	8	40
18-25	10	70
26-40	12	100
Over 40	10	60
Total	**40**	**270**

Buyers are in all parts of the population . . .

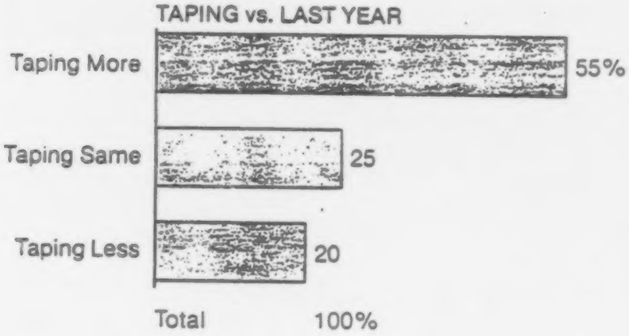
BLANK TAPE BUYERS
40 Million



"Customized" taping is on the rise

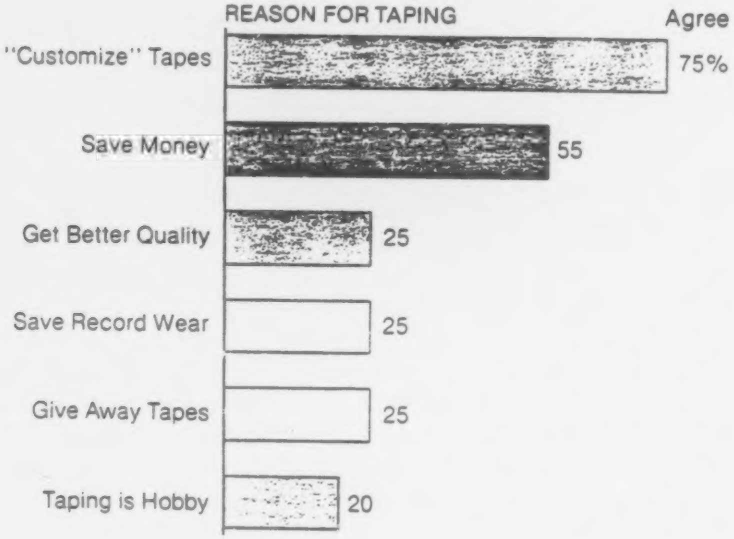
Over half the buyers say they are taping more than before . . .

BLANK TAPE BUYERS



They tape primarily to make "custom" tapes and to save money . . .

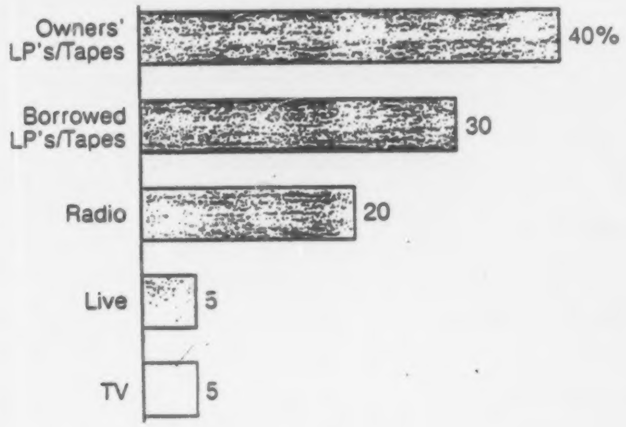
BLANK TAPE BUYERS



Blanks allow tapers to have their favorite music

Buyers tape primarily from their own collections or from borrowed LP's/tapes . . .

BLANK TAPE MUSIC SOURCES

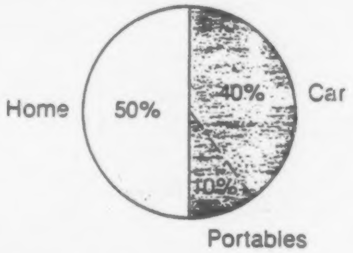


Total ' 100%

wherever they go

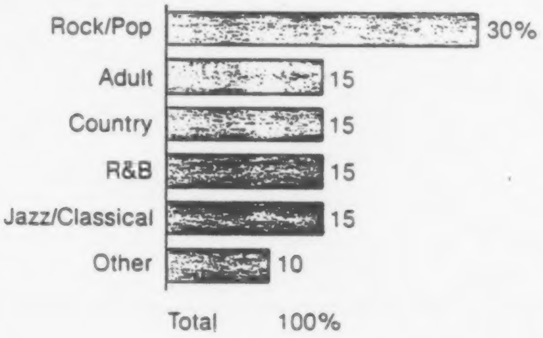
Half of buyers use tapes away from home . . .

BLANK TAPE BUYERS
Tape Use



Their favorite music includes . . .

BLANK TAPE BUYERS



Blank tapes have major impact on music purchases

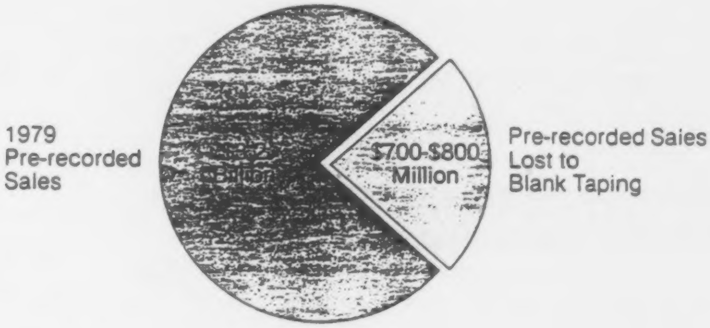
Tapers substitute blanks for three pre-recorded purchases each year. . .

BLANK TAPE BUYER ATTITUDES

	Average
"How many LP's or pre-recorded tapes would you say blank taping saved you from buying during 1979?"	4
"How many LP's or pre-recorded tapes did you buy specifically to tape during 1979?"	1
Pre-recorded purchases lost to blank taping	3

Blank taping costs the pre-recorded music industry up to 100 million units annually — or, lost sales of $700 million to $800 million at list prices. . .

MUSIC SALES AT LIST PRICES



To summarize:

Blank taping continues to increase

Buyers tape primarily to "customize" and to save money

Pre-recorded sales could be 20% greater without blank taping

ABOUT CBS RECORDS MARKET RESEARCH

CBS Records has been the industry leader in music research since the 1950's, when the Market Research Department was officially established. Today, major research activities include:

National Surveys — Each year, CBS conducts three custom-designed national probability studies. These provide comprehensive profiles of record/tape buyers and non-buyers. CBS has conducted these studies since 1974.

Consumer Panel — CBS maintains an exclusive panel of over 8,000 record and tape buyers. The panel, developed in 1973, provides data for studying buying trends by artist, music type and demographic groupings.

Special Surveys — CBS regularly carries out special marketing-oriented surveys, like this study on blank tape buyers. Topics include a wide variety of advertising tests, media usage surveys, and artist image studies.

5

A STUDY ON
TAPE RECORDING PRACTICES AMONG
THE GENERAL PUBLIC

Conducted for

THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION

And

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA

June 1979

The ROPER ORGANIZATION Inc.
One Park Avenue
New York, New York 10016

FOREWORD

Purpose Of The Study

The purpose of this study was to explore tape recording practices among the general public age 10 and older. Specifically, the study was designed to find the extent to which people make tape recordings of music and to get an indication of the impact of private taping on sales of records. The study was commissioned by the Recording Industry Association of America, a trade association of U.S. recording companies, and the National Music Publishers' Association, a trade association of U.S. publishing companies.

How The Study Was Conducted

A series of questions on tape recording was included as tack ons to Issue Number 79-4 of ROPER REPORTS, a subscription public opinion service of The Roper Organization Inc. For the ROPER REPORTS survey, a national cross section of 2004 adults age 18 and older was personally interviewed. All adults were asked the tape recording series. Further, half the sample was asked if there were any girls living in the household age 10 to 17, and the other half if there were any boys living in the household age 10 to 17. Ages of all girls or boys were then obtained, and respondents asked which ones, if any, ever record music on a tape recorder. Interviews were then sought with each girl (or boy) in the household who was reported to record music on tape. Those at home at the time of the adult interview were interviewed on the spot. Those who were not at home at that time were later telephoned, and interviews conducted on the telephone. All together, 131 girls and boys age 10 to 17 were interviewed. Weights were applied to bring all children of respondents (not just those who tape music) into their proper proportion in the population according to census data. This automatically weighted children who record music to their proper incidence.

The sampling methodology used for obtaining the adult sample for ROPER REPORTS and the weighting procedures used in this study are described in detail in the Technical Appendix at the end of this report. Copies of the questions asked of adults and children are included in the following section of the report.

All interviewing on this study was conducted between March 24 and April 4, 1979.

SUMMARY AND CONCLUSIONS

The key purpose of this study was to get an indication of the impact of home tape recording on the sales of records. While the study is not conclusive in terms of the extent of lost sales to the record industry, it does indicate that there is substantial loss.

There are two ways in which lost sales might be indicated from this study. One is from the number of recordings tape recorders say they have been saved from buying because of their taping. The other is the number of tapes reported made from borrowed records or tapes.

Looked at in terms of the number of recordings people say they have been saved from buying, there is a loss of 29% of potential sales volume for complete albums and singles in total—22% of potential sales for complete albums (or roughly 268 million albums), 48% of potential sales for singles (or roughly 213 million). Put another way, were it not for tape recording, the sales of complete albums would be 28% above what they now are, and sales of singles would be 93% above what they now are, if people's statements as to lost sales are accurate.

Looked at in terms of the number of recordings made from borrowed records or tapes, there is a loss of 14% of potential sales volume for complete albums and singles in total (or 201 million units); or, in other words, if it were not for taping from borrowed records or tapes, sales of complete albums and singles in total would be 25% above what they now are.

We suspect the lower loss figures (14% of potential sales) is closer to the mark. For example, the largest single source of taped music recordings was recorders' own record or tape collections. We question how many of these recordings respondents were "saved" from buying would have been purchased again if they had not been taped.

Nevertheless, there is no doubt that substantial record and pre-recorded tape sales are lost through taping. What is not clear is just how big "substantial" really is, taking into consideration the likely overstatement of "saved" purchases.

The findings of the study are discussed in detail in the following section of this report, along with the documentation for findings and conclusions presented here.

DETAILED FINDINGS

Incidence Of Taping Music

Just over one-fifth of the population age 10 and older say they have personally taped music on a tape recorder in the past twelve months. Young people are the heaviest music recorders. One-third of those age 10 to 17, and one-third of those age 18 to 29 say they have taped music in the past 12 months. Overall, 21% of adults have taped music. Males are heavier music tapers than females.

The incidence of music taping among various demographic groups is as follows:

Total sample	2409
Percentage who have taped music in past 12 months:	%
Among total sample (children and adults)	22
Among children age 10-17	32
Age: 10-13	27
14-15	39
16-17	32
Among adults	21
Age: 18-29	32
30-34	25
45-59	16
60 +	4
Sex	
Male	27
Female	18
Family Income	
Under $7,000	11
$7,000 - $14,999	19
$15,000 - $24,999	27
$25,000 and over	28
Race	
White	23
Black	21
Geographic Area	
Northeast	17
Midwest	25
South	21
West	30

Source Of Music Taped

Those who taped music in the past 12 months claimed to have taped nearly 836 million "pieces" of music--that is, they recorded that many things--record or tape albums, single records, radio programs, live concerts, etc. The largest single source of these recordings was their own record or tape collection (37% of all things taped). The next largest source was radio programs (30%), with borrowed records or tapes accounting for 24% of all things recorded and live concerts accounting for 10%.

Children (aged 10 to 17) record more from the radio than from any other source (42% of recordings), and next most from their own record or tape collections. One-quarter of their recording is from borrowed records or tapes, only 5% from live concerts.

Adults record more from their own collections (39%), with borrowed records or tapes and radio programs each used for one-quarter of their tapings.

	Number of music items taped in past 12 months (in millions)	Taped from: Own record or tape collection	Borrowed records or tapes	Radio programs	Live concerts
Total people	835.9 (100%)	306.7 (37%)	201.1 (24%)	248.8 (30%)	85.2 (10%)
Total children	208.5 (100%)	63.5 (30%)	52.3 (25%)	87.9 (42%)	10.3 (5%)
Total adults	627.4 (100%)	243.2 (39%)	148.8 (24%)	160.9 (26%)	74.9 (12%)

Note: Projected number of recordings may not add to totals in some instances because of rounding and/or using mid-points of ranges for projections.

Who Buys Records And Tapes

Based on reports from all adults, those who record music on tape are much heavier buyers for their own use of records, pre-recorded tapes and blank tapes than are non-recorders. While we did not interview children who do not record music, we can assume that the same pattern (not volume) of record and tape buying exists among children as adults. Roughly twice as many adult tape recorders as non-recorders buy LP records, singles and pre-recorded 8-track tapes. Four times as many recorders as non-recorders buy pre-recorded cassettes, seven times as many buy blank 8-track tapes and nearly nine times as many buy blank cassette tapes.

In terms of the percentages of people who buy, children who record (and therefore by inference all children) are by far the heaviest buyers of singles. They buy LP records and all types of tape slightly less than adult recorders.

	Total children (all recorders)	Adults		
		Total	Recorders	Non-recorders
Number of respondents	128	2004	412	1592
	%	%	%	%
Percentage who bought 1 or more in past 12 months				
LP records	63	39	70	31
Singles	58	14	22	12
Pre-recorded 8-track tapes	32	20	33	17
Pre-recorded cassette tapes	29	13	32	8
Blank 8-track tapes	29	11	35	5
Blank cassette tapes	58	18	60	7

In terms of sales volume, that is, numbers of records or tapes bought, more of every type of item is bought by adults--simply because of their greater number in the total population. Since we did not interview children who do not record music on tape, we can only make assumptions as to their record and tape purchasing. Assuming that non-recorders bear the same relationship to recorders among 10 to 17 year olds as they do among 18 to 29 year olds, we can arrive at rough projections of sales volume as reported by respondents.

Quite clearly, people exaggerated their purchases of LP records in the past twelve months. Projections from reported purchases of LP records would put total sales at 574 million, when in fact sales were more likely in the 350 million area. (Known sales in '78 were 341 million.) Reported purchases of singles were less exaggerated--230 million vs. a likely 200 million. (Known '78 sales were 190 million.)

Adult recorders account for a larger number of sales than non-recorders of LP records, pre-recorded cassettes, and blank 8-track and cassette tapes. Non-recorders account for a larger number of sales than recorders of singles and pre-recorded 8-track tapes. Children who are recorders appear to follow this same pattern except in the case of singles, where recorders and non-recorders account for roughly the same sales volume.

		Number of records/tapes reported bought in past 12 months (in millions)						
		Children			Adults--total			
	Total	Total	Recorders	Non-recorders (projected)	Total	Recorders	Non-recorders
# LPs bought	574.4	78.6	49.2	29.4	495.8	279.8	216.0
# Singles bought	233.1	95.2	47.7	47.5	137.9	61.0	76.9
# Pre-recorded 8-track	234.9	50.6	20.4	30.2	184.3	71.7	112.6
# Pre-recorded cassettes	161.7	13.6	9.8	3.8	148.1	94.3	53.8
# Blank 8-track	119.4	14.2	13.0	1.2	105.2	96.8	8.5
# Blank cassettes	328.7	43.1	40.9	2.2	285.6	251.7	33.9

The Impact Of Tape Recording On Record Sales

All recorders were asked how many complete albums they had been saved from buying during the past twelve months by taping their own music, and how many singles they had been saved from buying. If answers are taken at face value, the industry has a large loss in potential sales.

Recorders reported they were saved from buying 268 million complete albums. This would mean a loss of 22% of potential sales volume for LP records, pre-recorded 8-tracks and pre-recorded cassettes. Recorders reported they were saved from buying 213 million singles, or a loss of 48% of potential sales volume for singles. Put another way, sales of LP records, pre-recorded 8-tracks and pre-recorded cassettes would be 28% more than actual present sales, and sales of singles would be 93% greater--if the reports of purchases saved are taken at face value.

	Total (millions)	Children age 10 to 17 (millions)	Adults (millions)
Complete albums			
Number reported (or projected) bought	971.0	142.8	828.2
Number reported saved from buying	268.1	54.2	213.9
Total potential sales	1,239.1	197.0	1,042.1
Percent of potential sales lost through home recording	22%	28%	21%
Singles			
Number reported (or projected) bought	233.1	95.2	137.9
Number reported saved from buying	213.4	77.4	136.0
Total potential sales	446.5	172.6	273.9
Percent of potential sales lost through home recording	48%	45%	50%

While we do not doubt that there is loss of record sales through home taping, we are inclined to believe that the loss is not as great as these figures would make it appear. For one thing, it appears that recorders tended to regard most of what they taped as saved purchases, and we question that this is the case. For example, the number of recordings reported made during the past 12 months was about 836 million. If we make the assumption that tapes made from recorders' own collections are not lost sales, this leaves roughly 535 million tapes made from other sources. Recorders reported they were "saved" from purchasing 481 million records. This means that they would have bought 90% of everything they taped from sources other than their own collection--a figure we think is highly suspect.

Nevertheless, there is clearly a substantial loss of record sales due to taping. Another way of looking at potential lost sales is in terms of tapings made solely from borrowed records or tapes rather than in terms of reported purchases saved. Tapings from borrowed records or tapes represents a deliberate effort to acquire a particular recording that has been commercially produced and sold, and may be a closer measure of true lost sales than either total recordings made or reported "saved" purchases.

If recordings made from borrowed records or tapes are the loss, the industry is losing 14% of potential sales. This compares with a 29% loss if people's reported saved purchases of complete albums and single records are the loss. We suspect the 14% is closer to the mark than the 29%--and that even this figure may overstate the loss.

Sales Loss Based On Reported Saved Purchases	(in millions)
Total LP records, pre-recorded 8-tracks, pre-recorded cassettes and single records reported (or projected) bought)	1,204.1
Number of music recordings reported saved from buying	481.5
Total potential sales	1,685.6
Percent of potential sales lost through home recording	29%
Sales Loss Based On Reported Recordings From Borrowed Records Or Tapes	
Total LP records, pre-recorded 8-tracks, pre-recorded cassettes and single records reported (or projected) bought)	1,204.1
Number of music recordings reported made from borrowed records or tapes	201.1
Total potential sales	1,405.2
Percent of potential sales lost through home recordings	14%

Whatever the loss, it is likely to continue. Asked whether they are taping more, less or the same amount of music as a year ago, three-quarters said more or the same amount.

	Recorders		
	Total	Children	Adults
	%	%	%
How much music now taping vs. a year ago:			
More	38	51	34
Less	24	25	24
The same amount	36	24	40

Use Of Blank Tape--Music Vs. Other Recordings

By far the major use of blank tape is for recording music. 69% of all blank tapes bought or received as gifts in the past twelve months were used to record music. Among adults, 67% of tapes were used for recording music. Among children 76% were used for music. Half (51%) of all blank tapes bought or received were used for music recordings that were kept as part of recorders' permanent collections. 15% were used for re-recording music, and 3%, originally used for music recording were subsequently used for a non-music purpose. The remaining 31% were never used for recording music.

	Total (# in millions)	Children (answers of recorders only) (# in millions)	Adults		
			Total	Recorders	Non-recorders
			(# in millions)		
Total blank tapes bought or received as gifts in past 12 months	472.3 (100%)	67.8 (100%)	404.5 (100%)	362.1 (100%)	42.5 (100%)
Used to record music	324.9 (69%)	51.6 (76%)	275.1 (68%)	269.8 (74%)	-
And:					
Kept as part of permament collection	248.0 (53%)	32.0 (47%)	214.8 (53%)	210.7 (58%)	- -
Used for re-recording music	69.0 (15%)	19.5 (29%)	52.6 (13%)	51.4 (14%)	- -
Used for other things	8.0 (2%)	- (-)	7.7 (2%)	7.6 (2%)	- -
Used for non-music or unspecified purposes	147.4 (31%)	16.2 (24%)	129.4 (32%)	92.3 (26%)	42.5 (100%)

Note: Projected number of recordings may not add to totals because of rounding and/or using mid-points of ranges for projections.

Household Inventory Of Music Playing And Recording Equipment

The vast majority of households (83%) have some type of music playing and/or recording equipment. Record players are the most prevalent, in 78% of households. 43% have an 8-track player, 18% an 8-track recorder. 38% have a cassette player, 34% a cassette recorder. Adults who are recorders are by far the heaviest owners of all types of playing and recording equipment.

	Total households	Adults who record music on tape	Adults who do not record music on tape
	%	%	%
Types of music playing/recording equipment in household			
Record player	78	94	73
8-track player	43	60	39
8-track recorder	18	37	14
Cassette player	38	73	29
Cassette recorder	34	73	24
None	17	1	21

The large majority of record players are installed in the home (72%). 27% are portables. A little over half of 8-track players are installed in the home, with one-quarter installed in cars and one-fifth portables. 8-track recorders are mainly installed in homes, with one-quarter portable.

Cassette players and recorders are more prevalent as portables than anything else--roughly half of each of them. Most of the others are installed in homes.

	Total number in households	Installed in home	Installed in auto	Portable
Record players	2201 →	72%	2	27
8-track players	1313 →	56%	25	20
8-track recorders	429 →	72%	5	24
Cassette players	1239 →	40%	13	47
Cassette recorders	1038 →	45%	2	53

7

STATEMENT OF
RECORDING INDUSTRY ASSOCIATION OF AMERICA
AND
NATIONAL MUSIC PUBLISHERS' ASSOCIATION

In January 1982, the Recording Industry Association of America and the National Music Publishers' Association requested Professor Melville Nimmer to prepare a comprehensive legal memorandum expressing his views under the copyright laws concerning audio home taping, and to appear as an expert witness at the Congressional hearings on this subject. Professor Nimmer agreed to do so, and in accordance with that agreement, he prepared the Memorandum reproduced here as Appendix Six. That Memorandum reflects the legal views previously expressed by Professor Nimmer in his treatise, Nimmer on Copyright.

On Friday, April 9, 1982, Professor Nimmer informed us that, because of a potential conflict with other clients of Sidley & Austin, the law firm to which Professor Nimmer is Of Counsel, the firm had decided that he could not testify as an expert witness at the Congressional hearings, and that he had to withdraw his authorization to submit his Memorandum of Law. He expressly reaffirmed his views on the legal issues set forth in the Memorandum, however, explaining that the withdrawal of authorization related solely and entirely to the wishes of his law firm.

Counsel for RIAA and NMPA have carefully considered the claim of conflict of interest perceived by Sidley & Austin, and have concluded that there is no conflict which would bar Professor Nimmer from appearing as an expert witness. In any event, owing to the lateness of the action taken by Sidley & Austin, it was neither possible nor fair to RIAA and NMPA that the Memorandum be withheld from Congress. Accordingly, the Memorandum of Law prepared by Professor Nimmer is being submitted herewith.

THE LEGAL STATUS OF HOME AUDIO RECORDING OF COPYRIGHTED WORKS

by Melville B. Nimmer

THE LEGAL STATUS OF HOME AUDIO RECORDING
OF COPYRIGHTED WORKS

by Melville B. Nimmer[1]

INTRODUCTION

The recent decision in Universal City Studios, Inc. v. Sony Corporation[2] (referred to as the Betamax case) held that the video recording of copyrighted works in the home for private use constitutes copyright infringement. Those opposed to this decision have argued that since there is an exemption for audio recording, there is no justification for a different rule as to video recording. This Memorandum, based upon the analyses contained in my treatise Nimmer on Copyright, is intended in the first place to dispel the premise contained in that argument: There is not and never has been an exemption from copyright liability for home audio recording. This Memorandum further maintains that an otherwise infringing reproduction of a copyrighted work will not be subject to the defense of fair use simply because such reproduction is made by the process of audio taping, or other recording, and is intended for the private use of the person engaged in such audio recording. Finally, it will be argued that problems of enforceability and privacy may be met through the imposition of a royalty on manufacturers of audio equipment and tape.[3]

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[1] Professor of law, U.C.L.A. School of Law. (These are the personal views of the writer, and do not imply any institutional endorsement.)

[2] 659 F.2d 963 (9th Cir. 1981).

II

THERE IS NO EXEMPTION FOR AUDIO HOME RECORDING UNDER THE CURRENT COPYRIGHT ACT

The district court decision in the Betamax case,[4] although later reversed upon appeal,[5] is the source of a widely voiced assumption that audio home recording is subject to a special exemption under the Copyright Act. The district court decision, in holding video home recording to be noninfringing, rested its decision in part on a supposed exemption for audio home recording, which it then concluded was applicable to video home recording as well. Specifically, it held that notwithstanding the apparently contrary wording of Section

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[3] The issue of video home taping presents certain different questions which are not here considered, as they are beyond the scope of this Memorandum.

[4] Universal City Studios, Inc. v. Sony Corporation, 480 F. Supp. 429 (C.D. Cal. 1979).

[5] 659 F.2d 963 (9th Cir. 1981).

106(1) of the Copyright Act,[6] "the Congressional intent [vis-a-vis Section 106(1)] was that home-use sound recording was not prohibited." Then, as an alternative holding, the district court concluded that, in any event, the defendants' activities were defensible as "fair use" under Section 107.[7] The fair use defense is considered later in this Memorandum.[8] Focusing now on the supposed exemption, the district court's conclusion in this regard rests on two premises, each of which is in error. The first erroneous premise is that an audio home recording exemption was created as a part of the Sound Recording Amendment of 1971. The second erroneous premise is that such an exemption was incorporated in the current Copyright Act of 1976. We now proceed to an analysis of each of these premises.

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[6] "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords . . . ." 17 U.S.C. § 106.

[7] The district court found that "the legislative history of the new Act shows that Congress did not intend to restrain the home-use copying at issue here." 480 F. Supp. at 447. It then added that "even if this finding were erroneous," the doctrine of fair use would constitute a defense. Id.

[8] See ¶ III infra.

A. The Sound Recording Amendment of 1971 Did Not Create an Exemption for Audio Home Recording

The Sound Recording Amendment of 1971[9] amended the Copyright Act of 1909 so as to provide for the first time copyright in sound recordings.[10] The text of the Amendment itself contained no special mention of audio home recording, nor was there any such mention in the Senate proceedings which preceded its enactment of the Amendment. After Senate enactment, the measure went to the House Judiciary Committee, and its Report on the Amendment included a passage which was heavily relied upon by the district court in the Betamax case, and is the main source of the claim that a statutory exemption for audio home recording was adopted in the 1971 Amendment. That passage reads as follows:

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[9] Act of October 15, 1971; P.L. 92-140, 85 Stat. 391.

[10] This is to be contrasted with copyright in the musical or other underlying works which may be the subject of such recording. Copyright in such underlying works had been recognized under the 1909 Act since its inception (as well as under prior copyright laws). Those not familiar with copyright are sometimes puzzled by the distinction between a copyright in a musical work and a copyright in a sound recording of such musical work. The copyright in the musical work inheres in the composer of the music, whose rights may be acquired by a music publisher. The copyright in a sound recording inheres in those responsible for the artistic rendition of such musical work as captured in phonorecord (*e.g.*, phonograph record or tape) form. This includes the orchestra, the singer, the record company, etc. *See generally* *Nimmer on Copyright*, § 2.10[A][2] (1981).

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years."[11]

Does the above passage justify the conclusion of the Betamax district court that an audio home recording exemption (apart from the general doctrine of fair use) was contained in the Sound Recording Amendment of 1971? There are several different reasons which compel the contrary conclusion that no such exemption was created. There is first the fact that the 1971 Amendment was itself legislation limited to the creation of copyright in sound recordings, and did not (in this context) purport to affect the copyright in musical or other works which may be contained in such sound recordings. Therefore, the purported noninfringing status of "home recording" referred to in the House Report could at most be applicable to the sound recording copyright, not to the copyright in any underlying works which may be contained therein. It is true that the House Report offers the opinion that home recording would not infringe the copyright in any such underlying works, but this could be nothing more than the 1971 Congress' opinion as to the meaning of the 1909 Act, and as such not a statement of legislative intent.[12]

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[11] H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971).

In addition there is the fact that the above-quoted statement in the House Report was never joined in by the Senate. As far as that body is concerned, there is only the language of the statutory amendment itself, which certainly on its face carries no implication of any form of exemption. Even if one assumed that all of the voting members from the House side intended that a home recording exemption should be regarded as implicit in the statutory language, without evidence of a similar intent upon the part of those voting on the Senate side there is no justification for reading the exemption into the 1971 Amendment.

Finally, and perhaps most fundamentally, the above-quoted statement in the House Report in itself does not purport to create an exemption apart from the general doctrine of fair use. The Committee statement that "it is not the intention . . . to restrain . . . home recording" must be read within the context of the preceding and succeeding sentences. The preceding sentence states that "it is the intention of the Committee that this limited [sound recording] copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17." The succeeding sentence makes the point even more explicit: "the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." This, then, directly contradicts the Betamax district court's assumption that the 1971 Amendment created a special home recording exemption. To the contrary, sound recording copyright owners are to be "in no different position" than other copyright owners had been prior to the 1971 Amendment. Since there is no basis whatsoever for a claim (and no one appears to make a claim) that pre-1971 there was, apart from the doctrine of fair use, any basis for exempting home recording of copyrighted works from the reach of the Copyright Act, it follows that no such exemption was created under the 1971 Amendment.

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[12] United States v. Price, 361 U.S. 304, 313 (1960); Rainwater v. United States, 356 U.S. 591, 593 (1958).

If there were any disparity in this regard as between the House Committee Report and the individual statements of legislators and others, the Report would, of course, prevail. It will be seen, however, that the Betamax district court's further reliance upon such individual statements by Chairman

Kastenmeier (see 480 F. Supp. at 446) and by Assistant Register of Copyrights Barbara Ringer (see 480 F. Supp. at 445) is also ill-based. Consider first the colloquy on the House floor as between Chairman Kastenmeier and Representative Kazen:

> "Mr. Kazen: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> Mr. Kastenmeier: Yes.
>
> Mr. Kazen: In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure. this would not be included under the penalties of this bill?
>
> Mr. Kastenmeier: This is not included in the bill. I am glad the gentleman raises the point. On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report."[13]

The underlined portion of the above statement by Chairman Kastenmeier makes it very clear that he did not view the 1971 Amendment as creating any separate exemption, but that to the contrary he was referring to, and only to, the doctrine of fair use.

The statements of Miss Ringer relied upon by the Betamax district court occurred in a colloquy with Representative Beister. It proceeded as follows:

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[13] 117 Cong. Rec. 34, 748 (1971) (emphasis added).

"Mr. Beister: I do not know that I can add very much to the questions which you have been asked so far.

I can tell you I must have a small pirate in my own home.

My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set. Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, and this legislation, of course, would not point to his activities, would it?

Miss Ringer: I think the answer is clearly, "No, it would not."

I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: "What about the home recorders?"

The answer I have given and will give again is that this is something you cannot control.

You simply cannot control it.

My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future.

Other countries have felt it more directly than we, partly because record prices are lower here than, say, in Germany. In that situation there is a range of legal devices for trying to keep the practice under reasonable control. But I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping."[14]

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[14] Hearings on S.646 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22 (1971).

It will be seen that in the above-quoted statement, Miss Ringer is careful not to claim that the then proposed legislation would create a home recording exemption, or even that it would constitute fair use. Rather, she states that such legislation would not "point to" home recording in that "this is something you cannot control." That is, her remarks were directed simply to the practicality of enforcement, not to the theoretical reach of the 1971 Amendment. (For further on the practicality of enforcement, see ¶ IV infra.) Indeed, Miss Ringer's statement further suggests that the need for "reasonable control" of home recording (what she refers to as "philosophical dogma") may be reconciled with the practicalities of enforcement by the possible application of a royalties system such as that adopted by West Germany. She suggests that without such a reconciliation "sooner or later there is going to be a crunch here," but in 1971 she did "not see the crunch coming in the immediate future." Given the current devastating impact of home recording upon the music and recording business (see ¶ III.B.4. infra), it is obvious that "the crunch" is now upon us.

The Betamax district court relied upon an additional statement by Miss Ringer in a manner which displayed a misunderstanding of its significance. The statement appeared in the following further exchange between Representative Beister and Miss Ringer:

> "Mr. Beister: Secondly, with respect to video cassettes, are we approaching an additional problem, not with respect to private use, but with respect to public distribution after it has been retrieved over a home set?
>
> Miss Ringer: The answer is very definitely "yes."
>
> For years the motion picture industry has been faced with bootlegging problems, much of it deriving from the 10 mm prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.
>
> I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? It is certainly not protectable under the Federal statute."[15]

In this context, Miss Ringer's statement "It is certainly not protectable under the Federal statute" referred only to the noncopyrightability of sound recordings (as compared with the protected status of motion pictures, including video cassettes) prior to enactment of the 1971 Amendment. Indeed, it was the fact that sound recordings were "not protectable under the Federal statute" which created the need for the 1971 Amendment. This statement does not remotely imply that once such protected status was accorded by the 1971 Amendment, it would then be subject to a home recording exemption.

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[15] Id. at 22-23 (emphasis by Betamax district court).

B. In Any Event, There Is No Exemption for Audio Home Recording Under the Copyright Act of 1976

Even if the preceding reasoning were rejected, and it be assumed that an audio home recording exemption were somehow contained in the 1971 Amendment, it must be concluded that any such exemption was not carried over into the general revision of copyright law as embodied in the Copyright Act of 1976. The Betamax district court in finding such a home recording exemption relied primarily upon the "Home Recording" statement in the House Report relating to the 1971 Amendment. Without that statement even the pretense of a home recording exemption would dissipate. Nothing in the statutory language of the 1971 Amendment suggested any such exemption. Yet, when that statutory language was incorporated into the Act of 1976, it is most significant that neither the House nor Senate Judiciary Committees saw fit to incorporate in their respective committee reports the commentary on "Home Recording" as contained in the 1971 Committee report. This omission cannot be ascribed to an assumption by the Judiciary Committees that their commentaries upon the 1971 statutory language would be assumed to be applicable to the same language as incorporated in the 1976 Act. If that were the case it would have been unnecessary to repeat in the 1976 Committee Reports any of the commentary that had been contained in the 1971 Reports. Yet, in fact much of the 1971 House Report commentary is incorporated verbatim in the 1976 House Report.[16] The failure to include in the 1976 Report the "Home Recording" statement from the 1971 Report is doubly significant in view of the fact that whereas the 1971 Amendment did not by its terms affect copyright in musical works, the 1976 Act clearly did. Thus while the "Home Recording" statement in the 1971 Report could not constitute a statement of legislative intent regarding home recording of musical works,[17] such a statement in the 1976 Report would have had such an impact.

Finally, any question as to whether the Copyright Act of 1976 includes an exemption (not based upon fair use) for home recording would seem to be definitively set at rest by the following passage from the House Report for the 1976 Act: "it is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use."[18] This conclusion is further bolstered by the fact that Congress did specifically consider audio and video tape recorders and the problem of off-the-air taping in connection with the current Copyright Act, and approved certain narrow exemptions while withholding approval for a general home recording exemption.[19]

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[16] Compare, for example, H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 6 (1971) (bottom paragraph) with H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976) (second full paragraph).

[17] See text at footnote 10.

[18] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

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[19] For example, Congress explicitly provided an exemption for off-the-air video taping of audio-visual news programs by nonprofit libraries for distribution to scholars and researchers. See 17 U.S.C. § 108(h) and the House Report commentary:

> "It is intended to permit libraries and archives subject to the general conditions of this section, to make off-the-air video tape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 77 (1976) (hereinafter "H. Rep.").

An exemption was also provided for audio or video off-the-air taping taken from public broadcasting entity transmissions of published nondramatic musical works as well as video taping of published pictorial, graphic and sculptural works by governmental and other nonprofit bodies for use in classroom teaching activities provided the tapes are destroyed within seven days of initial broadcast. See 17 U.S.C. § 118(d)(3) and the House Report Commentary: "It is the intent of the Committee that schools be permitted to engage in off-the-air reproduction to the extent and under the conditions provided in 118(d)(3)." H. Rep. at 120. The Conference Committee report also expressed the view that "as long as clear-cut restraints are imposed and enforced, the doctrine of fair use is broad enough to permit the making of an off-the-air fixation of a television program within a nonprofit, educational institution for the deaf and hearing impaired . . . ." Remarks of Representative Kastenmeier at page H10875 of the Congressional Record of September 22, 1976, adopted in H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 70 (1976). It is clear, then, that Congress did specifically consider the issue of off-the-air tape recording by audio and video cassette recorders, and provided an exemption only in these explicit areas. Beyond that, the House Report stated that "It is not intended to give

[Footnote continued on following page]

The Copyright Act provides for a broad reproduction right under Section 106(1), subject to certain express exemptions in Sections 107-18. To conclude that in addition to these express exemptions there is also an implied home recording exemption would be exactly contrary to what the Supreme Court has said "must" be presumed. In Tennessee Valley Authority v. Hill,[20] the Court observed: "In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus [the statute in certain cited sections] creates a number of limited 'hardship exceptions,' none of which would even remotely apply to the [present case]. . . . [U]nder the maxim expressio unius est exclusio alterius, we must presume that these were the only 'hardship cases' Congress intended to exempt."[21]

[Footnote 19 continued from preceding page]
[taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." H. Rep. at 66.

[20] 437 U.S. 153 (1978).

[21] 437 U.S. at 188.

III

AUDIO HOME RECORDING DOES NOT CONSTITUTE FAIR USE

If, as argued in Paragraph II, there is no special home recording exemption under the Copyright Act, may it be said that this conduct is nevertheless defensible as fair use? That inquiry must be responded to on two different levels. First, does the "Home Recording" statement in the House Report relating to the 1971 Amendment determine the fair use issue in relation to audio home recording, and if not, do the general fair use factors as set forth in Section 107 of the current Act justify a conclusion of fair use?

A. The "Home Recording" Statement in the 1971 House Report Does Not Determine the Fair Use Issue

It may be argued that the "Home Recording" statement as contained in the 1971 House Report[22] constitutes an opinion that audio home recording constitutes fair use.[23] As a matter of law it can constitute no more than a statement of opinion, and not an expression of legislative intent, as regards the copyright in musical works.[24] But even as to the copyright in sound recordings, which was the subject of the 1971 Amendment, the statement itself at most merely equates the fair use status of sound recordings with that of other copyrighted works. That is, _if_ (but only if) audio home recording of other copyrighted works is fair use (an issue as to which the House Report on the 1971 Amendment may claim no special competence), then by reason of the 1971 Statement audio home duplication of sound recordings would have the same status. This leaves open the issue of the general status of audio home recording under fair use principles, a subject which is discussed below.

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[22] See ¶ II.A. above.

[23] Alternatively, the statement may be read as merely an observation that the statutory prohibition against unauthorized recording is unenforceable as against individual home duplicators. On the issue of enforceability, see ¶ IV below.

But even if the 1971 Statement were read as creating under the 1909 Act an absolute fair use rule vis-a-vis home duplication of sound recordings,[25] for several different reasons this does not determine the fair use issue under the Copyright Act of 1976. There is first the significant fact that the "Home Recording" statement was not repeated in the

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[24] _See_ the text to footnote 10 above.

[25] The statement of Chairman Kastenmeier quoted in the text to footnote 11 above may be read as assuming such an absolute rule. There was, of course, no similar statement from the Senate side.

Committee Reports for the Current Copyright Act.[26] Of even greater significance is the manner in which the general issue of fair use is treated under the Copyright Act of 1976. Section 107 of the current Act states certain general criteria to be taken into account in the determination of whether a given use is "fair." There is no attempt to define fair use, nor to determine on the legislative level whether any particular act of duplication would or would not constitute fair use. This approach is summed up in the Committee Reports with the statement:

> "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[27]

Thus, it is the judicial doctrine of fair use that had been developed under the 1909 Act which was adopted by the 1976 Act, not any prior legislative directives, including a directive that home recording shall be regarded as fair use, even if such a directive had in fact been articulated in the 1971 Amendment. The point is further amplified in the House Report, which states that" it is not intended to give [taping] any special status under the fair use provision . . . ."[28] The conclusion is, then, inescapable that audio home recording was not singled out by Congress for special fair use treatment under the Copyright Act of 1976. The question remains as to whether, applying the general judicial doctrine of fair use as codified in the Section 107 criteria, the defense of fair use is nevertheless applicable to audio home recording. We turn now to that topic.

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[26] See ¶ II.B. supra.

[27] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (emphasis added). See also S. Rep. No. 94-473, 94th Cong., 1st Sess. 62 (1975).

B. Audio Home Recording Does Not Constitute Fair Use

Section 107 of the Copyright Act lists the following four criteria, codified from prior fair use cases, which are intended to give guidance to the courts in determining whether a given use is "fair":

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[28] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

1. The Purpose and Character of the Use[29]

The preamble to Section 107 specifies certain "purposes" which fall within the core of fair use. These are: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." It will be seen that in each of these instances the use is to be within the context of a further commentary or exposition by the person making the "use."[30] Thus, as the court of appeals in the Betamax case observed, fair use involved "the use by a second author of a first author's work."[31] It is only when the user is himself an author, and is using a portion of a prior work in order to formulate more effectively his new work that the scope of copyright in the prior work may be limited under the doctrine of fair use. In such circumstances the public benefit from the dissemination of the new work may be said sometimes to outweigh the earlier author's interest in the full enforcement of his copyright.[32] The doctrine of fair use as applied by the courts has been limited to those instances where the purpose of the copier is to further his own authorship.[33] The Betamax court of appeals properly found that the established judicial doctrine of fair use is not applicable where the user makes a reproduction merely for his own "convenience" or "entertainment."[34] Yet, it is precisely an "entertainment" use, and only that, which is involved in most home audio recording. It can hardly be said, then, that the "purpose and character" of a home recording use comports with fair use requirements.

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[29] In referring to "the purpose and character of the use," Section 107(1) adds: "including whether such use is of a commercial nature or is for nonprofit educational purposes." Nevertheless, the fact that a given use is not "commercial" but is rather for "nonprofit educational purposes" does not necessarily mean that such use if "fair." See, e.g., Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) (nonprofit reproduction for school and church purposes held not fair use). In any event, audio home recording for fair use purposes may be regarded as "commercial." This point is explored in ¶ II.B.4. below.

[30] Such commentary or exposition will ordinarily be set forth in a writing which accompanies the reproduction of the copyrighted work. In the case of "teaching" this may not be the case, but even then the teacher will virtually always add an oral commentary or exposition.

[31] Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 970 (9th Cir. 1981), quoting Seltzer, Exemptions and Fair Use in Copyright 24 (1978).

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[32] "The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), quoted in Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981) (emphasis added).

[33] The court of appeals in the Betamax case cited as the one case which did not conform to this principle that of Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), which held library photocopying to be fair use. The Betamax court disapproved of Williams & Wilkins for its failure to comply with this "productive use" principle. In fact, however, Williams & Wilkins may conform to the "productive use" principle in that photocopies were furnished only for the purpose of "study and research," which implies a use that it is hoped will result in further scientific authorship.

[34] See 659 F.2d at 970.

2. The Nature of the Copyrighted Work

The defense of fair use is less applicable when the work which is copied is "creative, imaginative, and original"[35] than it is when the work is one "more of diligence than of originality or inventiveness,"[36] such as a catalog, index, or other compilation. The Betamax court of appeals was, thus, correct in its conclusion that "the scope of fair use is greater when informational type works, as opposed to more creative products are involved . . . . If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted."[37] Musical works, and the sound recordings thereof, which constitute the subject matter of most audio home recording, obviously fall within the "entertainment" characterization. As such, the doctrine of fair use is most constricted in these circumstances.

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[35] MCA, Inc. v. Wilson, 211 U.S.P.Q. 577 (2d Cir. 1981).

[36] New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977).

[37] Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 972 (9th Cir. 1981).

3. The Amount and Substantiality of the Portion Used

Audio home recording of musical works and of the sound recordings thereof almost always involves the reproduction of an entire work. It is the song itself, and not merely a particular passage from it, which the home recorder wishes to reproduce. It is obvious, then, that the application of this third fair use factor militates against a fair use defense. Indeed, it is generally held that the defense of fair use is never available to immunize copying of an entire work.[38]

4. The Effect upon the Plaintiff's Potential Market

This fourth fair use factor, which is often said to be the most significant of all,[39] most dramatically negates any claim that audio home recording may constitute fair use.

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[38] Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); see Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966); Encyclopaedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978).

[39] Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980); H.C. Wainwright & Co. v. Wall Street Transcript Corp., 418 F. Supp. 620 (S.D.N.Y. 1976), aff'd, 558 F.2d 91 (2d Cir. 1977); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973).

Although the precise numerical amount of lost sales of phonograph records and pre-recorded tapes which annually occur by reason of audio home recording practices may be the subject of debate, the Roper Organization concluded in a 1979 study that "there is no doubt that substantial record and pre-recorded tape sales are lost through taping."[40] The Hamilton Study, prepared for the Copyright Royalty Tribunal, concluded that "consumers taping music does have an impact on their purchases of prerecorded music."[41] The CBS Records Market Research Study, released in Fall, 1980, found that audio home taping costs the pre-recorded music industry up to 100 million units annually, which at list prices amounts to an annual loss of 700 to 800 million dollars.[42] It further concluded that pre-recorded sales would be 20% greater without blank taping.[43] And the most recent study on home taping released by Warner Communications Inc. found that "during the 1980 survey yea., over $600 million worth of blank tape was used by some 39 million people to bring over $2.85 billion worth of music (and other professional entertainment) into their homes."[44] The study concluded: "Were home taping not possible, tapers would be spending hundreds of millions of additional dollars on records and prerecorded tapes."[45]

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[40] A Study on Tape Recording Practices Among the General Public (The Roper Organization, June 1979), Summary and Conclusions, at 3.

[41] Report of the Committee on Home Taping (Copyright Royalty Tribunal, 1979), at 3.

[42] Blank Tape Buyers -- Their Attitudes and Impact on Pre-Recorded Music Sales (CBS Records Market Research, Fall, 1980), at 15.

[43] *Id*. at 16.

The above studies merely confirm what is empirically obvious. There can be no doubt that audio home recording does have a devastating impact upon the potential market for music and sound recordings. If ever this fourth fair use factor were to militate against application of the fair use defense, it must do so in this case. It further demonstrates the fallacy of those who argue that audio home recording should be regarded as fair use because it is "noncommercial." The individual who in his home engages in audio home recording may not be seeking a "commercial advantage" in that he is not in the business of selling such recordings. His motivation is nevertheless "commercial" for fair use purposes in the sense that by home recording he thereby avoids the cost of purchasing records or pre-recorded tapes. In this sense, what occurs in the home is no less "commerce" than that which occurs in the record shop.[46]

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[44] Home Taping: A Consumer Survey, Warner Communications Inc., March, 1982, p. 2.

[45] Id.

IV

ENFORCEABILITY, PRIVACY AND CONTRIBUTORY LIABILITY

Opposition to the application of the Copyright Act to audio home recording is often based upon two general themes which should now be considered. First, it is argued that a rule of law rendering audio home recording copyright infringement would be entirely unenforceable, since there is no way of policing what goes on in the privacy of the home. The second frequently voiced theme (which somewhat contradicts the first) is that to enforce such a rule of law would be to create an intolerable invasion of the privacy of the home. Standing alone, one must agree that there is merit in both of these concerns. Unquestionably, the fact that copyright infringement actions have not been brought against individuals who engage in audio home recording for their own use attests to both the difficulty of enforcement as against the individual, and to the shield of privacy that might properly be invoked if this were attempted.[47]

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[46] See Wickard v. Filburn, 317 U.S. 111 (1942), which held that since wheat grown for home consumption has "a substantial economic effect" on the amount of wheat sold in interstate commerce, it is thereby subject to interstate commerce regulation.

There is a response that meets both of these concerns, and which nevertheless adequately protects the copyright interest. Before suggesting that response, it should first be made clear that the problems of enforceability and privacy do not convert that what would otherwise constitute copyright infringement into fair use. If given conduct is unlawful, as for example the unlawful possession of firearms,[48] the fact that such conduct occurs in the privacy of the home may make it very difficult to enforce the law, and in some instances enforcement might require unacceptable invasions of privacy, but this does not in itself make possession of firearms in the home lawful. Likewise, enforceability and privacy problems may deter civil copyright infringement actions for audio home recording, but that in itself does not make such recording fair use.[49]

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[47] See Stanley v. Georgia, 394 U.S. 557 (1967).

[48] The example constitutes criminal conduct. Despite some common misconceptions, home recording for home use, whether audio or video, gives rise to only civil, not criminal liability. See 17 U.S.C. § 506(a). The point made in the text is equally applicable, however, whether the law in question creates civil or criminal liability.

[49] This assumption that property rights of others somehow cease to operate within the confines of one's home is plainly fallacious. Would anyone argue that I may destroy a book borrowed from a library if I do so within the four walls of my house? Does a library lose its property right in the tangible book because it has consented to its being brought

[Footnote continued on following page]

Copyright owners of musical works and of sound recordings may be protected against the wholesale dilution of their property rights fostered by the new technology of home recording without confronting either the enforcement or privacy problems referred to above. This may occur through the approach suggested by the court of appeals in the Betamax case. The court there held that the defendant manufacturers and sellers of videotape recorders and tapes were liable as contributory infringers. This was based upon such defendants' knowledge that the equipment sold would be "used to reproduce copyrighted materials."[50] The Betamax case, of course, involved video rather than audio home recording. But such knowledge by the sellers of intended infringing use of audio equipment is surely no less than it is in the case of sales of video equipment.[51]

[Footnote 49 continued from preceding page]
into my house? Are utility companies without recourse if within my house I turn off the gas and electric meters and proceed to appropriate their property without paying for it?

[50] 659 F.2d at 975.

[51] For analogous holdings in the case of audio equipment see Stewart v. Southern Music Distributing Co., Inc., 503 F. Supp. 258 (M.D. Fla. 1980) (owner-lessor of juke boxes said to be liable as contributory infringer where lessee used the juke box for infringing performances); Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972) (recording machines and blank cassettes held subject to seizure as "means for making . . . infringing copies").

The Betamax court of appeals remanded to the district court for determination of the appropriate remedy. In doing so, the court of appeals suggested that instead of the imposition of an injunction, a court could "when a great public injury would result from an injunction . . . award damages or a continuing royalty."[52] In a broad hint, the court of appeals added: "This may very well be an acceptable resolution in this context."[53] This pregnant statement of direction from the appellate court strongly suggests that in its view a proper resolution of the dispute will be found not in an injunction banning use of the machines but rather in a court-imposed compulsory license royalty as against the machine and tape manufacturers and sellers.

Note that this approach solves both the enforceability and privacy problems adverted to above. There is no longer a problem of enforcement as against the individual who engages in home recording since the payment of the court-imposed royalty by the manufacturer relieves from infringement liability the subsequent recording activities of those who purchase equipment from such manufactur[illegible] Application of the royalty decree as against the manufacturer by reason of its sales presents no problems of enforceability. Similarly, the privacy problem is resolved since there is no longer a need to determine whether the home user is recording in the privacy of his home since such recording is, in any event, validated by the manufacturer's royalty payment. This is what the Betamax court of appeals had in mind when it stated: "It seems more appropriate to address the privacy concerns raised by the District Court in fashioning the appropriate relief."[54]

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[52] 659 F.2d 976.

[53] Id.

There remains the problem of apportioning the royalty funds collected among the claimant copyright owners. This presents a complex, but by no means insuperable problem. Indeed, it is just such a royalty mechanism, imposed by statute rather than by a court, which has been adopted in the current Copyright Act in connection with cable television.[55] All of this could be done in the audio home recording context by judicial decree. It is obvious, however, that it would be far more efficient if such a procedure were adopted by legislation.

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[54] 659 F.2d at 972.

[55] Under Section 111(d) of the Copyright Act a compulsory license is imposed upon operators of cable television systems whereby they are required to pay a percentage of their gross receipts into a fund which is disbursed by the Copyright Royalty Tribunal among copyright claimants. The procedure for determining the identity and participation of such claimants has worked reasonably well.

The proposed Mathias Amendment No. 1333 and Edwards Bill H.R. 5705 would accomplish exactly such a salutary objective.

CONCLUSION

Audio home recording is not the subject of any special exemption. Neither does it constitute fair use under the Copyright Act of 1976. Problems of enforceability and of consumer privacy will be avoided by a recognition that the manufacturers of recorders and tapes are contributory infringers, and should be subject to a royalty payment. If the copyright system is to function effectively in concert with the new recording technology such a royalty system is essential.

8

JAPAN PHONOGRAPH RECORD ASSOCIATION

RECORD BUILDING
8-9, 2-CHOME TSUKIJI CHUO-KU TOKYO JAPAN

No. 5/82

March 8, 1982

Mr. Stanley M. Gortikov
President
Recording Industry Association
of America, Inc.
888 Seventh Avenue
New York, N.Y. 10106
U.S.A.

Dear Mr. Gortikov:

Record Rental

A thousand apologies do I owe you for an extreme delay in answering your cable which we received on February 19 in writing.

I wired back to you a short reply on the same day reading:

> NUMBER OF RENTAL HOUSES 1050 WITH 30 PERCENT SALES LOSS STOP LETTER FOLLOWS REGARDS KAMEI

The current situation of rental business spreading like a prairie-fire is as follows:

1. Advent of record rental business and its proliferation

   Since the advent of one so-called record rental house in the suburbs of Tokyo in June 1980 which offers the commercial records produced by other parties for rent as business, the same business operators have mushroomed within an extremely short period throughout the country.. And they have increased up to the tune of well over 1,100 in February 1982 which account for ten percent of approximately 8,000 legitimate record retailers and are ever more gaining in number.

2. Actual situation of record rental business and its outcome

A rental house operator keeps an average inventory of 1,000 to 1,500 units of commercial discs (mostly LP's) and rent one disc for about ¥200 per day (¥50 is added from the second day onward).

Actual business is being done in the way of not only renting for the purpose of making money, without any exhaustive labor, the commercial records which manufacturers created and produced with a considerable amount of expenses born, but also misusing, without any shame, the situation that about 90 percent of general families have a recording equipment in possession and that abused private taping eventually has mounted up to an illegal level.

Under this unfair advantage, rental business seems to have grown up far beyond the expectation at the outset. As its result, 97.4 percent of the users of rental records are recording from those records and the quantity of discs which those users purchase subsequent to rental was introduced dipped by about 30 percent from that of pre-rental days.

In addition, sales of a legitimate record shop located in the neighborhood of a rental house has plunged by about 30 percent where the same discs with those handled by a rental house are concerned (see Chart 3). This is really a distressful status.

Discs dealt in by rental houses belong to the categories of new music (Japanese), rock (Western) and jazz fusion (Western).

On account of this unprecedented predicament, unusual events such as change or closure of business are seen arising among legitimate dealers.

3. Point at issue of record rental business

This is the difference from rental of other merchandise.

As afore-mentioned, being different from rental of other merchandise, record rental business is inevitably accompanied by the act of reproducing the same merchandise with that offered for rental. It must be interpreted that record rental is a business which duplicates the commercial records produced by other parties under the name of rental.

In other words, sans the basis of private taping existing, record rental business cannot be estabiished. Record rental business can only subsist where copies of commercial discs could be reproduced.

4. Relations with copyright problems

On October 30, 1981, 13 representative member-comparies of our Association filed a civil suit against four major record rental firms seeking a ban on their use of records. The point of this legal action consists in that rental houses are in the act of renting records with a full knowledge that records will be copied to make duplicates and that this infringes the reproduction right owned by record producers.

On the other hand, the Copyright Council of the Ministry of Education disclosed its conclusion to the effect that the actual situation of private taping "makes it unreasonable to leave it unattended". Our Association, in collaboration with other right owners' organizations, is carrying on activities seeking a legal and economic resolution to the act of private copying on which a certain degree of restriction should be imposed, but, has, in actuality, unreasonably proliferated up to the extent to hurt the benefits of authors (lyric writers and composers), neighboring copyright owners (performers and record producers) along with the widespreading popularization of recording equipment.

Neverthless, we have to expect that it would require a considerably long length of time before the infringement of the reproduction right by record rental operators and private copying could be resolved by the copyright law. In the course of such time, the damage caused by record rental business is certain to worsen, so unless an immediate countermeasure be taken to relieve our industry by protecting commercial record producers, the recording industry will come out to forcedly face the risk of collapse.

With best regards.

Sincerely yours,

J. Kamei

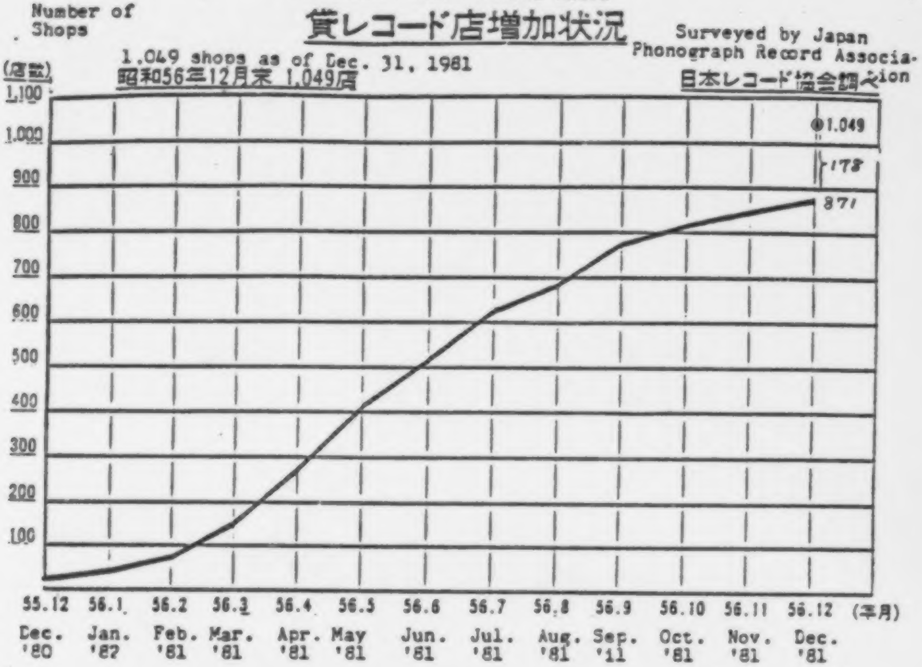
J. Kamei
Executive Director

JK/jf

Chart 1

INCREASING RECORD RENTAL SHOPS

貸レコード店増加状況



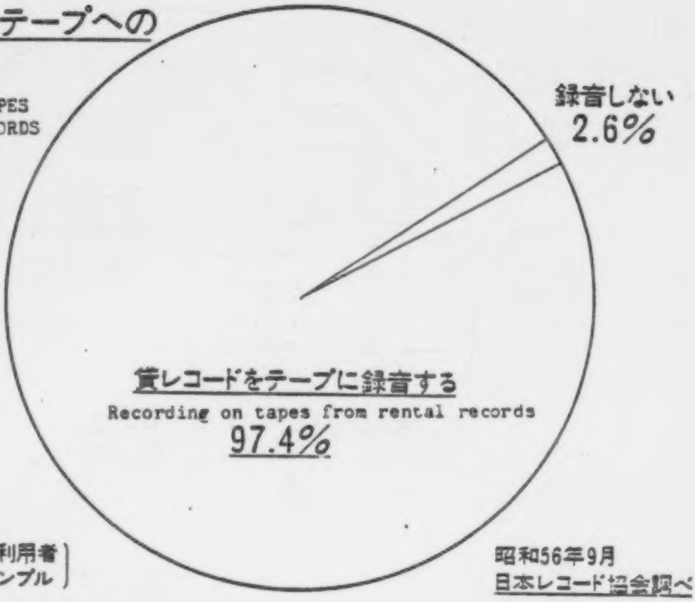
A record rental shop took a bow in summer of 1980 and its total number in the beginning of 1981 was less than 30. However, reinforced by the popularization of excellent recording equipment such as tape recorder which is now owned by nearly all families, the record rental shop which rents records for money-making depending on the practise of possible copying is increasing in number month after month.

Opening days of 178 houses are unknown.

Chart 2

貸レコードからテープへの録音状況

RECORDING ON TAPES
FROM RENTAL RECORDS



〔貸レコード利用者
計1,000サンプル〕

Took 1,000 persons who
utilize rental service
for sample

昭和56年9月
日本レコード協会調べ

Japan Phonograph
Record Association

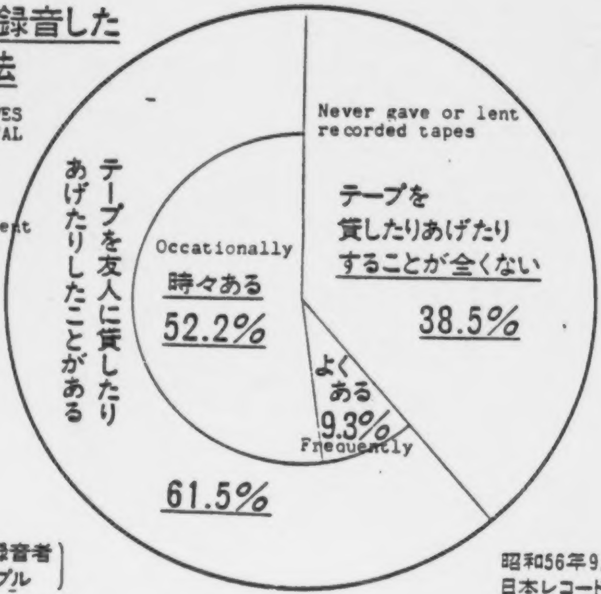
貸レコードをテープに録音している人は97.4%で，ほとんど全員に近い。

97.4% of people investigated are recording tapes from rental records. This means nearly all people who were investigated.

Chart 3

貸レコードから録音したテープの利用法

UTILIZATION OF TAPES RECORDED FROM RENTAL RECORDS



（貸レコード録音者 計974サンプル）

Took 974 persons who utilize rental service as sample

昭和56年9月
日本レコード協会調べ

Japan Phonograph Record Association

貸レコードから録音したテープを友人に貸したりあげたりすることがある人は、61.5％（よくある9.3％、時々ある52.2％）で過半数を占め、全くない人は38.5％である。

People who gave or lent recorded tapes to friends account for 61.5% of the whole people investigated (9.3 frequently and 52.2% occasionally). They cover over one-half, while people who did not give or lend account for 38.5%.

Each person belongs to this 61.5% lends his recordings averagely to 3.6 friends.

Senator **Mathias**. Dr. Greenspan, we are glad to welcome you back to Capitol Hill.

Dr. **Greenspan**. Thank you, Mr. Chairman.

Senator **Mathias**. I do not know that addressing yourself to this subject is more difficult than some of your previous testimony here.

Dr. **Greenspan**. It is, indeed.

Mr. Chairman, my firm, Townsend & Greenspan, has been retained by the Recording Industry Association to provide an economic analysis of home audio taping of copyrighted sound recordings.

Our study affirms the strong, underlying growth in home audio taping and its negative impact on sales of prerecorded tapes and discs. In the process, I have examined many of the issues which Jack Wayman raised in his testimony, and I must say I find them without merit. I would be glad to discuss them in detail, if you should like to at a later point.

Although some forms of audio taping of records have been in use for years, home taping emerged in the decade of the 1970s particularly late in the decade, as a major factor affecting the music industry. In 1970, we estimate that approximately one-fourth of U.S. households had home tape recording equipment. The most recent data suggest that more than 50 percent of households own more than 75 million audio taping units and that new purchases are running at approximately 20 million units a year. Tape recorders sales, I might add, are still going up; other audio equipment sales are, in fact, going down. The taping process itself as I see it shows no signs of being affected in any significant way by the obvious recession we are in.

Home taping should be viewed as an alternate means of acquiring recorded music. The price of acquiring music in the form of a record or prerecorded tape must, therefore, be compared with the cost of acquiring that music by taping it at home. The cost to a consumer of a prerecorded disc or tape is the retail purchase price; in contrast, it is more complex to identify the costs involved in the purchase of music through home taping. It consists of both the fixed costs of recording equipment and the out-of-pocket costs of blank tape.

Clearly, the cost of the recording equipment is, in many cases, a significant factor, and probably the most substantial potential barrier to the growth of taping. But once the fixed cost of the equipment has been paid and the equipment is in place, the costs of taping music become out of pocket only, the cost of the blank tape.

We have estimated that the cost of home taping was only 30 percent of the equivalent 1981 price of the recording at retail. Unless this gap narrows dramatically, we can expect that the share of the total market of recorded music accounted for by home taping will continue to rise. This means that tape and equipment manufacturers and consumers who tape can freely secure the benefits of the property rights of the copyright creators, a matter of significant benefit to the former without any compensation to the latter.

As one might expect, home taping has been rising at a very substantial pace in recent years. Assuming only a single use of the blank tape, in 1972, home taping accounted for 20 percent of the total hours of recorded music available both from purchase and taping. By 1981, it had risen to 42 percent. These data indicate that in 1981, for every 100 recordings sold, an additional 72 were home taped.

Sample data suggest that almost two-fifths of home taping was in lieu of the purchase of prerecorded records or tapes last year. This represents lost sales of approximately 28 percent of the total volume of record sales in 1981. This percentage of sales displaced by home taping is the equivalent in 1981 to lost record sales approaching $900 million. In addition, we estimate that this displacement depressed prices on all record sales at least by 5 percent—that is the equivalent of $150 million—below what they otherwise would have been. Hence, we estimate the overall retail dollar losses from home taping last year were approximately $1.05 billion.

It should not be surprising to find an effect on the prices of recordings from home audio taping which displaces a significant amount of unit sales. Indeed, there is considerable evidence to suggest that the average price level for prerecorded tapes and discs last year, and presumably, currently, was at least several percentage points lower than would have prevailed in a market not suppressed by home taping. It is apparent from the price structure patterns of recent years that the relative softness of record prices is not a response to lowered cost pressures, technological breakthroughs, or some other industry-related factors. On the contrary, the evidence suggests that the failure of the record price levels to rise in line with consumer prices generally was at the expense of profits—that is, a market-related inability to pass on increased costs. Profit margins dropped sharply in 1979, with the industry as a whole probably operating at a loss. The recovery since then appears to be minimal.

It is obvious that as home taping continues to grow, the release of new records by the recording industry which have been falling sharply recently will decline further. There will be fewer and fewer original performances on records for purchasers to enjoy. Clearly, for home taping to exist, there must be a record industry. Hence, it would be an extraordinary irony if the huge, technological success of home taping led to its own demise.

There are no winners in this process, for the recording industry supports a vast network of composers and performing artists and is the source of a very significant proportion of radio programing.

There appears to be no successful pricing strategy for the industry to respond to the home taping problem. If taping continues to erode record sales and profits, the recording industry might be forced to attempt to raise prices in an endeavor to recoup losses. That, however, would only further reduce the sales of prerecorded music and probably increase the shift toward lower cost home taping.

Alternatively, record companies might be pressured competitively to cut prices, to narrow the gap between home taping costs and retail record prices. That, of course, would accelerate the profit deterioration in the industry because costs are rigid. It would decrease the industry's capacity to take the types of risks which the nature of the record business requires.

Thus, there is very little that the recording industry can do to achieve profitability in the face of continued expansion of home taping.

Thank you.

[Prepared statement of Alan Greenspan; plus comments on the testimony of Alan Greenspan and Stanley Gortikov by the Electronic Industries Association Consumer Electronics Group follow:]

SUMMARY STATEMENT OF
DR. ALAN GREENSPAN
SENATE COMMITTEE ON THE JUDICIARY
APRIL 21, 1982

Home taping has caused, and will continue to cause, severe economic damage to the recording industry. The economic realities of home taping suggest that there is little that the industry can do to sustain its profitability in the face of continued widespread home taping. These conclusions are based on the following essential facts:

1. Home taping has been rising at a very substantial pace in recent years. Assuming only a single use of a blank tape, in 1972 home taping accounted for 20 percent of the total hours of recorded music available both from purchase and taping. By 1981 home taping had risen to 42 percent of the total.

2. This amount of home taping has had a substantial impact in displacing sales of sound recordings. Overall, almost two-fifths of all home taping was in lieu of the purchase of pre-recorded records or tapes last year. This means that 28 percent of total record sales was displaced by home taping. That is comparable to lost record sales in 1981 of approximately $900 million.

3. Record company profit margins dropped sharply in 1979 with the industry as a whole probably operating at a loss. The recovery since then appears to have been minimal.

4. The volume of sales lost through home taping has disturbing implications for the recording industry and ultimately for those who purchase records. Already, total releases are down in the last three years by almost a third and employment in the industry has fallen off from its high in the late 1970s. It is obvious that, as home taping continues to grow, there will be fewer and fewer original performances on records for purchasers to enjoy and for tapers to copy.

5. If taping continues to erode record sales and profits, the recording industry might be forced to attempt to raise prices in an endeavor to recoup losses. That, however, would only further reduce the sales of pre-recorded music and probably further increase the shift toward lower cost home taping.

6. Alternatively, the record companies might be pressured competitively to cut prices to narrow the gap between home taping costs and retail record prices. That, of course, would accelerate the profit deterioration in the industry and decrease its capability to take the types of risks which the nature of the record business requires.

STATEMENT OF ALAN GREENSPAN

Mr. Chairman, Townsend-Greenspan has been retained by the Recording Industry Association of America to provide an economic analysis of home audio taping of copyrighted sound recordings.*/

The basic purpose of this study is to estimate the impact and implications of home audio taping on unit sales and prices of discs and prerecorded tapes and ultimately on the ability of the recording industry to continue to meet the needs of the consumer public. That a large, and increasing, amount of home taping has been taking place is clearly evident, given the expansion in the sales of tape recorders and blank tapes. A key question, however is what has been the impact of this activity on sales of prerecorded music? How, in effect, would the recording industry have evolved in recent years had home taping never technologically developed?

We have analyzed this question with the assistance of two basic sets of data: (1) the substantial amount of sample survey information on home taping practices from which inferences with respect to the impact on sales of recordings can be made, and (2) government and financial data on the markets for sound recordings, tape recorders and blank tapes. Both sets of data reflect the strong underlying growth in home audio taping and its negative impact on sales of prerecorded tapes and discs.

Although some forms of audio taping of records have been in use for years, home taping emerged in the decade of the 1970s, particularly late in the decade, as a major factor affecting the music industry. In 1970, we estimate that approximately one-fourth of U.S. households had home tape recording equipment; by 1977 that figure had grown, with 39 percent of households reporting ownership. The most recent data suggest that more than 50 percent of households own more than 75 million audio taping units and that new purchases are running at approximately 20 million units a year. Tape recorders, I would add, are going [illegible]

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*/ Dr. Greenspan is Chairman and President of Townsend-Greenspan Company of New York City.

From an economist's viewpoint, home taping should be viewed as an alternate means of acquiring recorded music. The price of acquiring music in the form of a record or prerecorded tape must, therefore, be compared with the cost of acquiring that music by taping it at home. The cost to a consumer of a prerecorded disc or tape is the retail purchase price. In contrast, it is more complex to identify the costs involved in the "purchase" of music through home taping. It consists of both the fixed costs of recording equipment and the out-of-pocket costs of blank tape.

Clearly, the cost of the recording equipment is in many cases a significant factor, and probably the most substantial potential barrier to the growth of taping. But once the fixed cost of the equipment has been paid and the equipment is in place, the costs of taping music become out-of-pocket only -- the cost of the blank tape.

As indicated above, the data on audio recording equipment suggest that these fixed costs are no longer the barrier they once were -- given that more than 50 percent of American households already own taping equipment, and there are annual additional purchases of 20 million units a year.

The identification of the costs involved in the "purchase" of recorded music through home taping entails the appropriate allocation of both the cost of equipment as well as the cost of blank tape. We have estimated that the amortized 1981 costs of taping equipment is the equivalent of

75 cents per prerecorded disc or tape and that the cost of the blank tape in album equivalent terms was $1.25. Hence, the total "taping" costs, $2.00, were only 30 percent of the equivalent 1981 price of the recording at retail, i.e., $6.56. Unless this gap narrows dramatically, we can expect that the share of the total market of recorded music accounted for by home taping will continue to rise. Obviously, the most significant part of this difference (perhaps all) reflects the failure -- in technical terms -- to amortize the capital costs reflected in the copyright. This means that tape and equipment manufacturers, and consumers who tape, can freely secure the benefits of the property rights of the copyright creators -- a matter of significant benefit to the former without any compensation whatsoever to the latter.

As one might expect, home taping has been rising at a very substantial pace in recent years. Assuming only a single use of a blank tape, in 1972 home taping accounted for 20 percent of the total hours of recorded music available both from purchase and taping. (This excludes music available from counterfeiting and piracy). By 1981, it had risen to 42 percent. These data indicate that in 1981, for every 100 recordings sold, an additional seventy-two were home taped.

Sample data indicate that approximately three-quarters of taping capacity is being used to record music. Of that, approximately 30 percent of music taping is from borrowed records; another 40 percent is to make a duplicate of or a new format for a record owned by the taper. The remainder, 30 percent, is used primarily to tape recordings from radio or television.

The next step -- determining the proportion of home taping which displaces purchases of prerecorded records and tapes -- is less precise. But it is clear that the number is substantial. From the available data, it appears that roughly 55 percent of the borrowed records used for taping would have been purchased had home audio taping not been possible. The data indicate that approximately 30 percent of those who tape their own records (mainly for car or office copies) would have purchased an additional record or prerecorded tape. And, a third of all the off-the-air taping probably was a substitute for purchase.

Overall, this suggests that almost two-fifths of home taping was in lieu of the purchase of prerecorded records or tapes last year. This represents lost sales of approximately 28 percent of the total volume of record sales in 1981.

This percentage of sales displaced by home taping is the equivalent in 1981 to lost record sales approaching $900 million. In addition, we estimate that this displacement depressed prices on all record sales by at least 5 percent ($150 million) below what they otherwise would have been. Hence, we estimate the overall retail dollar losses from home taping last year were approximately $1.05 billion.

It should not be surprising to find an effect on the prices of recordings from home audio taping which displaces a significant amount of unit sales. Indeed, there is considerable evidence to suggest that the average price level for prerecorded tapes and discs last year, and presumably currently, was at least several percentage points lower than would have prevailed in a market not supressed by home audio taping. Data from the CBS Consumer Panel shows that prices of prerecorded tapes paralleled the average price level for all consumer goods and services from 1974-1978. From 1978-1981, however, average annual prices of prerecorded tapes went up to 3.2%; the price of all consumer goods and services rose 9.1% per year on average. Had average prerecorded tape prices paralleled the general rise in consumer prices in 1981, they would have been 18% higher than they in fact turned out to be. Retail list prices reported by the Recording Industry Association of America exhibited a similar pattern. It is apparent from the price structure patterns of recent years that the relative softness of record prices is not a response to lowered cost pressures, technological breakthroughs or some other industry-related factors.

On the contrary, the evidence suggests that the failure of the record price levels to rise in line with consumer prices generally was at the expense of profits, that is, a market-related inability to pass on increased costs. Profit margins dropped sharply in 1979 with the industry as a whole probably operating at a loss. The recovery since then appears to have been minimal.

The volume of lost sales through home taping, in light of this economic experience, poses disturbing implications for the recording industry and ultimately for those who purchase records. Already, employment in the industry has fallen off from its high in the late 1970s and total releases are down in the last three years by almost a third. It is obvious that, as home taping continues to grow, the sale of records produced by the recording industry will decline further. There will be fewer and fewer original performances on records for purchasers to enjoy and for tapers to copy. Clearly, for home taping to exist, there must be a record industry. Hence, it would be an extraordinary irony if the huge technological success of home taping led to its own demise. There are no winners in this process, for the recording industry supports a vast network of composers and performing artists, and is the source of a very significant proportion of radio programming.

There appears to be no successful pricing strategy for the industry to respond to the home taping problem. If taping continues to erode record sales and profits, the recording industry might be forced to attempt to raise prices in an endeavor to recoup losses. That, however, would only further reduce the sales of prerecorded music and probably increase the shift toward lower cost home taping.

Alternatively, record companies might be pressured competitively to cut prices to narrow the gap between home taping costs and retail record prices. That, of course, would accelerate the profit deterioration in the industry because costs are rigid; it would decrease the industry's capacity to take the types of risks which the nature of the record business requires.

Thus, there is very little that the recording industry can do to achieve profitability in the face of the continued expansion of home taping. This is the case, notwithstanding what some observers see as sales opportunities from such advances as digital recordings. Any sales impetus would be only a temporary reprieve from economic pressures. They cannot avoid the drain on the industry from the competitive use of home audio taping.

For economic incentives to work appropriately, property rights must protect the rights of capital assets whether in physical or intangible form. At present, as the data show, home taping is causing severe economic damage to the property rights of owners of copyrights in sound recordings and musical compositions. Under present and emerging conditions, the industry simply has no out. Unless something meaningful is done to respond to the home taping problem, the industry itself is at risk.

METHODOLOGY AND STATISTICAL APPENDIX

Industry, trade (1) and government sources provided data on shipments of sound recordings, blank tapes and audio tape recorder equipment. Sample surveys documented various aspects of home taping practices. Although, for any given year, shipments are not identical with consumer purchases, the trends and levels of both series were presumed to be roughly similar, and for this study shipments were used as an indicator of sales.

Estimating Taping Equipment Ownership

A historical series on the number of households in the U.S. as of the end of the year was derived from U.S. Census data by adjusting previously published levels by those now indicated by the 1980 census. From the WCI studies, the percent of households with audio taping equipment was available for April, May 1977 and May, June 1980. These studies also indicated the proportion of households owning at least one 8-track, cassette, and reel-to-reel recorder and hence the sum of those percents indicated multiple ownership of different types, but not of the same type. The EIA study of ownership for November, December 1980 was more extensive and suggests probable aggregate ownership of approximately 65 million music capable taping units, as well as some indication of average age of some of the taping equipment in place at the time of the survey. A historical series on the number of audio tape recorders shipped each year, both domestic and imports, was compiled from U.S. Department of Commerce data. For domestic shipments prior to 1973, the data were linked to EIA industry estimates. Combining recent ownership data with previous sales implied a survival pattern which is, of course, approximate.

To arrive at a series on the number of tape recorders in place at the end of the year, shipments in each year were assumed to be scrapped according to the following schedule: current year, 2%; second year, 10%; third year, 15%; fourth year, 15%; fifth year, 15%; sixth year, 10%; seventh year, 10%; eighth year, 10%; ninth year, 8%; tenth year, 5%.

The next step was to estimate the number of households owning one or more audio tape recorders and the percent this was of all households. The average number of audio tape recorders per taper owning household implied from the WCI studies and estimates of units in use was 1.50 at the end of 1976 and 1.57 at the end of 1979. Considering the recent growth in the shipment of audio tape recorders, we concluded that the prevalence of multiple taper households was relatively small a decade ago. As a consequence, we assumed an average 1.25 audio tape recorders per taper owning household at the end of 1969 and obtained intervening years by interpolation. The series on the number of tape recorders in use and the average number of audio tape recorders owned by taper owning households yielded an annual series on the number of households owning one or more audio tape recorders.

Estimating costs involved in home taping

The costs involved in home taping include the cost of the equipment and the cost of the blank tape itself. For illustrative purposes, the approximate cost of a portable cassette tape recorder and a cassette tape were used. These were derived from statistical data on retail sales dollar volume and number of units shipped (including imports) as reported in the trade publication "Merchandising". Table 2 details the cost derivation.

Estimating the hours of recorded music

Recorded music is available both from purchases and home taping. The first step in estimating total hours of recorded music available from purchases was to obtain a historical series on unit shipments by the recording industry. These data were available from RIAA from 1973 forward. For the period 1969-1972, unit shipments of 8-track cartridges and cassette tapes were estimated from available dollar volume and an estimate of unit price based on a sample of reporting companies. In the case of singles and albums, a similar procedure was used, employing the available dollar volume for total discs as a control.

The next step was to estimate playing time per sound recording unit. For 8-track cartridges and cassettes, this was assumed to be an average of 40 minutes in all years. For singles and albums, data on tune length and album length were available for the years 1965, 1973 and 1980. Intervening years were interpolated. Finally, total playing time (unit shipments X playing time per unit) was estimated separately for singles, albums, cartridges and cassettes, and summed to arrive at total hours of recorded music from purchases of sound recordings. The data can be found in Table 3.

A similar procedure was followed in estimating total hours of recorded music available from home taping. Data on unit shipments (including imports) of blank cartridges and cassettes were available from the trade publication "Merchandising", beginning in 1974. For cassettes, an available 1971 estimate of the number of units shipped by the trade publication "Billboard" allowed us to interpolate the missing years, 1972 and 1973.

Average playing time per blank tape was estimated at 35 minutes in 1971, since mostly C-30 and C-40 cassettes were in use at that time. Similarly, because C-60 and C-90 tapes were used most often in 1981, an average of 75 minutes of playing time per unit was used. Intervening years were estimated by interpolating.

The next step was to calculate total playing time available on blank tapes for all purposes by multiplying unit shipments by playing time per unit. The recent WCI study indicated that 75% of all blank tapes was used to record music, the remaining 25% being used to record speech in school or at the office and for personal or family recordings. Applying the 75% figure to total hours of playing time for all purposes, provided a measure of total hours of recorded music available from home taping. The data can be found in Table 3.

Evaluating the retail dollar losses from home taping

Home taping has impacted the sound recording industry by effecting sales and depressing prices. In order to evaluate the retail dollar losses, we first derived an estimate of the extent to which home taping displaced the purchase of pre-recorded music using sample data covering the reason for taping by source of the taping. The derivation can be found in Table 4 and Table 6. We estimated that 38.4% of home taping was a substitute for purchase. (2)

We have used two approaches to convert this percentage into retail dollar losses. The starting point of the first was the number of blank tapes purchased. The second approach used the number of music hours recorded on blank tape. Both methods yield a figure approaching $900 million and are detailed in Table 7.

To this figure we have added an estimate of the extent to which the displaced sales depressed prices. As can be seen from Table 8, the average price of pre-recorded tapes tracked the implicit price index for all consumer expenditures, fairly closely through 1978 but, beginning in 1979, tape prices lagged. By 1981 the divergence had cumulated to 18%. Data collected for the years 1974 through 1979 (3) indicate that gross profit margins were stable between 1974 through 1978, but dropped sharply in 1979 suggesting that the failure of tape prices to match consumer price increases in 1979 reflected competitive factors such as home taping. Scattered evidence for 1980 and 1981 suggests only a modest margin improvement, confirming the presumption of prices being depressed from the market, as distinct from the cost side. We have used "at least 5%" to provide a conservative estimate of how much of the retail dollar loss was attributable to depressed prices, since profit margin data for the past two years is fragmentary.

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(1) While these data are in certain instances informed judgments, they apparently square reasonably well with government statistics (imports, shipments, etc.) when they overlap.

(2) The annual "Home Entertainment Survey" conducted by WCI in November 1981 confirmed the reasonableness of our estimate. Of the respondents in the mail panel, 40% of those who taped complete albums indicated that they would have bought the album had they been unable to tape it. In addition, of those taping selections, 35% report they would have purchased the selection or the album containing it, if it were not possible to tape the selection.

(3) Economic Study of the Recording Industry, Cambridge Research Institute, April 1980.

TABLE 1

GROWTH IN HOME AUDIO TAPE RECORDING

	TAPE RECORDERS				BLANK TAPES[3]		
	Number of Units (Millions)		Households Owning One or More Recorders[2]		Units Shipped		
	Shipped	In Use[1,2]	Percent of all Households	Number (Millions)	Number (Millions)	Playing Time[4] (Millions of Hours)	Playing Time Per Tape Recorder Unit In Use (Hours)
1969	6.93	20.74	26.3	16.60	122	71.1	3.4
1970	8.45	25.09	30.2	19.51	132	76.8	3.1
1971	8.75	28.87	32.8	21.84	142	82.7	2.9
1972	10.27	33.32	34.8	23.82	152	97.2	2.9
1973	10.78	37.41	37.0	25.99	163	113.1	3.0
1974	9.30	39.15	37.4	26.82	174	130.8	3.3
1975	7.82	38.77	36.0	26.45	192	157.6	4.1
1976	12.75	42.84	38.0	28.53	218	194.8	4.5
1977	13.68	47.21	40.2	30.93	234	225.7	4.8
1978	16.20	53.23	43.7	34.32	252	261.2	4.9
1979	16.30	58.30	46.0	37.01	226	250.0	4.3
1980	19.71	65.54	50.1	41.14	236	278.3	4.2
1981	22.65	74.47	55.1	46.26	238	298.0	4.0

1. Shipments in each year were assumed to be scrapped according to the following schedule; current year, 2%; second year, 10%; third year, 15%; fourth year, 15%; fifth year, 15%; sixth year, 10%; seventh year, 10%; eighth year, 10%; ninth year, 8%; tenth year, 5%.
2. End of year
3. Cassette tapes and 8-track cartridges
4. All purposes

Sources: U.S. Department of Commerce; Merchandising, March 1982, March 1981, March 1980; WCI; EIA; Townsend-Greenspan & Co.

Table 2

Illustrative Costs Involved in Home Taping of Recorded Music in 1981

A. Taping Equipment

1. Average cost of equipment: $54
   Allocate ½ of the cost for taping
   Assume a 5 year life
   Allocate 4 tapes per year per tape recorder

2. Cost of taping per cassette
   $54 ÷ 2 ÷ 5 ÷ 4 = $1.35

3. Album equivalents per blank cassette (assume average 75 minutes per blank cassette)

$$\frac{\text{Average playing time per blank cassette (75 minutes)}}{\text{Average album playing time (40 minutes)}} = 1.875$$

4. Cost of taping an album
   $1.35 ÷ 1.875 = approximately 75¢

B. Blank Tape

1. Average cost per cassette (75 minute average) $2.38

2. Cost of a cassette in album equivalent terms:
   $2.38 ÷ 1.875 = approximately $1.25

C. Total Cost (in album equivalent terms)

1. Taping equipment	$ .75
2. Blank tape	1.25
3. Total	$2.00

Source: Merchandising, March 1982; Townsend-Greenspan & Co.

Table 3

PLAYING TIME OF MUSIC RECORDING[1]

(Millions of hours)

Date	←--- From Blank Tapes 8 - Track	Cassettes	All Purposes[2]	Music ---→	←--- Pre-Recorded Music Singles	Albums	8 - Track	Cassettes	Total ---→	←--- All Sources Total Recorded Music	Percent From Blank Tape ---→
1969	7.4	63.7	71.1	53.3	18.2	170.1	38.7	12.2	239.2	292.5	18.2
1970	8.5	68.3	76.8	57.6	18.8	176.1	49.8	11.1	255.9	313.5	18.4
1971	9.8	72.9	82.7	62.0	20.7	187.2	52.5	14.3	274.7	336.7	18.4
1972	12.3	84.8	97.2	72.9	26.2	192.4	63.2	17.1	299.0	371.9	19.6
1973	15.4	97.7	113.1	84.8	28.9	175.0	60.7	10.0	274.5	359.3	23.6
1974	19.2	111.6	130.8	98.1	26.5	173.4	64.5	10.2	274.6	372.7	26.3
1975	24.4	133.2	157.6	118.2	21.6	161.9	63.1	10.8	257.4	375.6	31.5
1976	28.2	166.6	194.8	146.1	25.7	172.9	70.7	14.5	283.8	429.9	34.0
1977	32.7	193.0	225.7	169.2	26.3	219.0	84.9	24.6	354.8	524.0	32.3
1978	33.2	228.1	261.2	195.9	26.6	217.9	89.1	40.9	374.4	570.3	34.4
1979	23.9	226.1	250.0	187.5	30.4	186.2	68.2	52.3	337.1	524.7	35.7
1980	20.3	258.1	278.3	208.8	22.0	197.6	56.7	66.0	342.3	551.0	37.9
1981	12.8	285.2	298.0	223.5	20.6	174.5	33.3	82.7	311.1	534.6	41.8

1) Average playing time x number of units shipped

2) Includes music, speech and other

Source: RIAA, Merchandising, March 1982, March 1981, March 1980; Billboard, Aug. 26, 1972; Townsend-Greenspan & Co.

Table 4

BLANK TAPE MUSIC SOURCES
(Percent)

	Sample Survey				
	CBS	WCI			Avg.
		Albums	Selections	Avg.	
From owned records or tapes	40%	45%	33%	39%	40%
From borrowed records or tapes	30	34	21	28	30
From radio or TV	25	21	40	33	30
From live performances	5	-	6		
Total	100%	100%	100%	100%	100%

Source: "Blank Tape Buyers: Their Attitudes and Impact on Pre-Recorded Music Sales", CBS Records, Fall, 1980.
"A Consumer Survey: Home Taping", Warner Communications Inc., March, 1982.

Table 5
The Major Reason For Taping[1]
(Percent of tapers in each category)

	All Tapers				Type of Taping X Source of the Taping[2]								
					Album only Tapers			Selections only Tapers			Albums and Selection Tapers		
	Total[3]	Own	Borrowed	From the Air	Own	Borrowed	From the Air	Own	Borrowed	From the Air	Own	Borrowed	From the Air
1. To preserve the quality of my records	8.0%	11.0%	5.3%	0.2%	8.5%	11.3%	0%	12.4%	2.2%	0%	13.4%	1.2%	0.9%
2. To get a better quality recording than on records	2.0	1.2	1.1	1.6	0	0.7	3.1	1.2	2.4	2.0	2.4	0.5	0
3. To get a better quality recording than on prerecorded tapes	3.0	3.4	2.9	0.4	1.2	2.9	0	3.4	0	0	5.6	5.7	2.2
4. To make a copy for my car or office	17.0	32.7	11.0	3.3	45.1	10.2	12.4	29.0	5.5	2.0	28.3	17.6	3.4
5. So I didn't have to buy it	25.0	13.5	46.6	32.5	11.0	54.0	35.0	11.4	39.9	32.3	16.0	41.5	38.9
6. So I can find out if I want to buy it	2.0	1.5	2.7	3.9	0	2.4	0	4.4	3.3	4.9	0.3	2.7	0
7. Because a prerecorded tape of an album is not available	7.0	2.8	7.2	11.8	0	10.6	0	3.7	2.9	17.2	4.[illegible]	4.1	0
8. Because stores make it hard to buy prerecorded tapes	0	0	0	0	0	0	0	0	0	0	0	0	0
9. Because I enjoy creating my own programs	11.0	10.3	4.7	7.7	7.4	0	24.3	10.3	12.0	6.4	14.2	4.9	5.3
10. Because tapes are easier and more convenient than records	9.0	10.1	8.3	10.9	14.6	3.6	9.2	9.8	6.5	11.2	8.7	16.6	10.0
11. Because taping is fun	9.0	5.0	5.8	14.3	4.0	3.3	16.0	8.1	10.4	13.3	2.8	5.3	16.2
12. Because I can't get my money back on prerecorded entertainment, but I can reuse tapes	0	0	0.3	0.5	0	0	0	0	1.0	0	0	0	2.5
13. Because records and prerecorded tapes become outdated as my tastes change	2.0	1.5	0.7	7.9	0	1.0	0	4.8	1.0	8.0	0	0	8.5
14. Other	5.0	7.0	3.5	5.1	8.1	0	0	1.6	12.9	2.8	3.6	0	12.0
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

(1) Reason for taping music and other professional entertainment that the respondent could have bought as a record or prerecorded tape.

(2) Individuals were characterized as taping from "own", "borrowed" or "from the air" based on which source they used most frequently. Thus each individual appears only in one cell.

(3) Includes a small number of individuals who recorded primarily live performances.

Source: "A Consumer Survey: Home Taping", Warner Communications, Inc., March 1982 (unpublished data).

Table 6

Proportion of Home Taping Displacing Purchases of Pre-recorded Music

Source of Taping	Percent Taping	Percent Who Would Have Purchased if Taping Unavailable
From owned records or tapes	40%	30%
From borrowed records or tapes	30	55
From radio, TV or live performance	30	33
Total	100%	38.4%

Note: The column on "percent taping" is an average based on sample surveys as reported in Table 4.

The column on "percent who would have purchased" is derived from Table 5. Full weight was applied to line 5, and fractional weights (½ to "owned"; 3/4 to "borrowed"; ¼ to "from the air") to line 4. The 38.4% was calculated using the percent taping as weights.

Source: Townsend-Greenspan & Co.

Table 7

Estimated Retail Volume Displaced by Home Taping in 1981

Method I				
(1)	Blank tape purchases (in units)	238.4	million	(Merchandising)
(2)	Three-fourths used for music taping	178.8	million	(WCI Survey)
(3)	Percent displacing retail purchases	38.4%		(Table 6)
(4)	Number displacing retail purchases	68.7	million	(2) X (3)
(5)	Album equivalents	128.8	million	1.875 X (4)
(6)	Displaced purchases, retail value	$845	million	(5) X $6.56 per album
Method II				
(1)	Music hours recorded on blank tape	223.5	million	(Table 3)
(2)	Percent displacing retail purchases	38.4%		(Table 6)
(3)	Displaced retail purchases (in hours)	85.8	million	(1) X (2)
(4)	Retail sales of music recordings (in hours)	311.1	million	(Table 3)
(5)	Displaced purchases as percent of actual retail	27.6%		(3) ÷ (4)
(6)	Retail sales of music recordings	$3122	million	
(7)	Displaced purchases, retail value	$862	million	(5) X (6)

Source: Townsend-Greenspan & Co.

Table 8

Retail Pre-recorded Tape Prices
Compared with Average Consumer Prices

	Average Price Paid for a Pre-recorded tape	Price Level for All Consumer Goods and Services	Retail Price Ratio of Pre-recorded tape to All Consumer Goods and services
	(Dollars)	(1972 = 100)	
1974	$4.69	116.3	.0403
1975	4.99	125.1	.0399
1976	5.26	131.6	.0400
1977	5.55	139.5	.0398
1978	5.96	149.0	.0400
1979	6.12	162.3	.0377
1980	6.48	178.9	.0362
1981	6.56	193.7	.0339

Source: CRU Consumer Panel; U.S. Department of Commerce

TABLE 9
EMPLOYMENT AND SHIPMENTS DATA
THE SOUND RECORDING INDUSTRY

ANNUAL	EMPLOYMENT (000)	NET SHIPMENTS (Millions of 1977 Dollars)
1972	25.0	3048
1973	24.8	2762
1974	23.7	2744
1975	22.1	2564
1976	25.2	2811
1977	26.5	3501
1978	28.7	3689
1979	27.2	3308
1980	23.7	3379
1981	22.4	3083
Quarterly (seasonally adjusted)		
1980 Q1	24.8	835
Q2	24.1	793
Q3	23.2	852
Q4	23.0	879
1981 Q1	22.6	928
Q2	22.9	780
Q3	22.9	686
Q4	21.4	729

(1) Singles, albums, 8-track cartridges, cassettes

Sources: U.S. Bureau of Labor Statistics; RIAA; Townsend-Greenspan & Co.

1981 ESTIMATE OF LOSS DUE TO HOME TAPING: TAPERS' REPORTS OF REPLACEMENT

EXECUTIVE SUMMARY

A recent Warner Communications Inc. (WCI) report on home taping showed that in 1980 the market value of home taped music and other professional entertainment exceeded $2.85 billion. Further, the report concluded that, were home taping not possible, tapers would have spent at least an additional $600 million on prerecorded product. The present report uses the tapers' own perspective to develop an additional measure of the extent to which home taping replaces the purchase of prerecorded product.

Sample - As part of its ongoing panel research, WCI conducts an annual "Home Entertainment Survey." This survey was included in the November 1981 diary, which was mailed to a select panel of U.S. households. The panel is maintained by Mail Diary Panel, Cranford, New Jersey. The survey was completed by 3,264 respondents age 10 and older.

Replacement Questions - All respondents were asked whether they had taped any music or professional entertainment in the past 12 months. Those responding "yes" then indicated whether they would have purchased the last album and/or selection they taped if they could not have made a taped copy.

Key Findings - 40% of those taping complete albums report they would have bought the album had they been unable to tape it. 35% of those taping selections report they would have purchased the selection or the album containing it had they been unable to tape it.

Other Findings - There is not one replacement value; tapers' reports of their likelihood of buying had they been unable to tape vary greatly depending upon their demographic characteristics and various aspects of their taping behavior. Thus, the overall replacement values given above represent weighted averages across all possible sources (e.g., broadcast performances, own or borrowed records), reasons for taping, and types of music taped.

Note - The above replacement values are based on mail panel respondents' answers to hypothetical questions. The report not only considers the limitations of using a mail panel and the difficulties involved in asking respondents to make hypothetical judgments, but it also describes how we have attempted to resolve these problems.

Conclusion - Despite the above limitations, we believe that the data obtained in the present study provide reasonable and reliable estimates of replacement from the tapers' own perspectives. More specifically, the tapers themselves report that 4 out of every 10 taped albums and 3.5 out of every 10 taped selections replace purchases of prerecorded product.

1981 ESTIMATE OF LOSS DUE TO HOME TAPING: TAPERS' REPORTS OF REPLACEMENT

The recent WCI report on home taping (see M. Fishbein, S. Middlestadt and M. Kapp, "A Consumer Survey: Home Taping" WCI, March 1982) provided evidence that in 1980 the market value of home taped music and other professional entertainment exceeded $2.85 billion. Although the report recognized that every album or selection that is copied is not a "lost sale," it took the position that "[a]ll copying infringes upon the lawful and legitimate rights of the copyright owners." More specifically, the report pointed out that, "[e]very time a complete album or selection is taped, the taper is reproducing a copywritten work in its entirety without providing fair and equitable compensation to the copyright owners." Moreover, the report clearly indicated that taping replaces sales of prerecorded product. For example, when asked to give their reasons for taping, 45% of the current music tapers reported they had made at least one recording so they "didn't have to buy" the prerecorded product. Not only was this the most frequent reason given, but 25% said this was the reason they taped most often.

The report further pointed out that consumers spent over $600 million on blank tapes to bring this $2.85 billion worth of music into their homes. It was argued that this $600 million represents the minimal additional amount that would have been spent on prerecorded product had home taping not been possible. This argument is based on the finding that the more people feel music is important to them, the more they value "hearing what they want, when they want, without commercial interruption." That is, the more one views music as important, the more one is motivated to personally own copies of recorded music. It seems reasonable to assume that people set aside a certain proportion of their discretionary income in order to bring these personal copies into their homes. At the present time some of this discretionary income is used to purchase prerecorded music and some is used to purchase blank tape to record music. Were home taping not possible, all of this discretionary income would be spent on prerecorded product.

Despite these findings demonstrating enormous loss to the industry, WCI felt it important to obtain an additional estimate, based on the tapers' own perspectives, of the extent to which taping replaces purchases of prerecorded product. More specifically, they requested that a measure be obtained by asking tapers what they would have done had they been unable to tape.

Although it would appear to be relatively simple to ask tapers how their purchasing of prerecorded product would be affected were home taping not possible, this unfortunately is not the case. First, while respondents can give quite accurate descriptions of their own behavior, they often have difficulty in making inferences about how they would behave in hypothetical situations. It was primarily for this reason that the WCI Home Taping Report was based entirely on behavioral data. Second, psychological research has clearly demonstrated that there are systematic biases in the ways that people attribute causes to their own behavior. Thus, it is not surprising that even slight variations in the wording of hypothetical causal questions produce enormous variations in the responses one obtains.

Despite these problems, it is sometimes possible to increase the reliability of a respondent's answer to a hypothetical question by getting him or her to focus explicitly on a particular behavioral act. Thus, in the present study respondents are asked to consider the last tape recording of music or other professional entertainment that they made. They are then asked whether they would have purchased that piece of music had they been unable to tape it.

Although the above procedure has considerable merit, it still asks respondents to make a hypothetical judgment. Moreover, it is a well-known fact that consumers tend to overestimate their probability of purchase. The extent of the overestimation varies greatly depending upon the type of product being purchased. Our data with respect to records and prerecorded tapes suggest that in this product category the overestimation tends to be a relatively small percentage. As will be seen below, we have attempted to compensate for this overestimation by using a conservative estimate of replacement.

Finally, it also must be recognized that the likelihood that one would have purchased the prerecorded version had one not been able to tape will vary considerably depending upon such things as: (1) the reason for taping; (2) the source from which the recording was made (e.g., own records or tapes, borrowed records or tapes, or off the air); (3) the type of music that was recorded; and (4) whether the recording was of a complete album or was an individual selection or an excerpt from an album. However, if one assumes that the tapers interviewed are representative of all tapers, it can be argued that, with a large enough sample, the overall replacement figure obtained would essentially be equivalent to a weighted average across all possible combinations of reasons, sources and types of music. Thus, it is necessary to carefully consider the representativeness of the sample. The remainder of this report describes the methods, procedures and results of a supplemental study directed at the replacement question.

METHODS AND PROCEDURES

As part of its ongoing panel research, WCI conducts an annual "Home Entertainment Survey." This survey was included in the November, 1981 diary which was mailed to a select panel of U.S. households. The panel is maintained by Mail Diary Panel (MDP), Cranford, N.J. MDP is responsible for the sampling design and data collection as well as for coding and key punching the data. The survey was completed by 3,264 respondents age 10 and over.

THE REPLACEMENT QUESTIONS

Included within the survey were two replacement questions. More specifically, after being asked:

> "In the past 12 months did you yourself do any taping of music or other professional entertainment either from your own or borrowed records and tapes, the radio, the TV or live performances?"

current music tapers (i.e., the 429 people responding "yes" to the above question) were asked the following two questions:

> 1. "Considering the last complete album you taped would you have bought it as a record or prerecorded tape if you were not able to make your own recording?"
>
> 2. "Considering the last single selection you taped would you have bought it or the album that contained it if you couldn't make your own recording?"

RESULTS

Table 1 (page 8) shows the responses of the weighted sample of tapers to the two replacement questions. More specifically, it shows the percent of tapers giving each response as well as the repercentaged overall replacement value. It can be seen that, of those tapers who had taped a complete album, 40% said they would have purchased the last album they taped had they been unable to tape it. Similarly, of those tapers who had taped a single selection, 35% said they would have purchased the selection or the album containing it, had they been unable to tape it.

Note that in calculating these replacement values, current music tapers who gave no answer were treated as if they would not have bought if they were unable to tape rather than as respondents who did not tape a complete album or single selection. This conservative approach was taken for two reasons. First, it could be argued that for at least some respondents the lack of an answer means the subject was uncertain about his or her purchase decision. Second, and perhaps more important, as was pointed out earlier there is a tendency for subjects to slightly overestimate their likelihood of purchasing prerecorded product. The conservative estimation procedure was used to compensate for this overestimation.

To further explore the replacement question, separate analyses were run within different demographic groupings. The results of these analyses are presented in Table 2 (page 9). The figures in the table are replacement values calculated as in Table 1 for each demographic group. Thus for example, 44% of the males who taped a complete album indicated that they would have purchased the last album they taped had they been unable to tape it. In comparison, album taping among females is less likely to replace sales of prerecorded product. That is, only 35% of the females who taped a complete album said they would have purchased it had they been unable to tape it.

The table clearly shows that replacement values vary considerably depending not only on the type of taping done (complete album vs. single selection) but also upon the demographic characteristics of the taper. To illustrate, consider the effect of income on the likelihood that the taping of a complete album replaces its purchase in prerecorded form. It can be seen that low income tapers reported that they would have purchased approximately 3 out of every 10 (29%) complete albums they taped. In contrast, middle income tapers reported that they would have purchased 5 out of every 10 (52%). Note, however, that the relationship between income and replacement is not linear. That is, upper income tapers report an intermediate 38% replacement value. With respect to complete album taping, replacement values range from 29% to 52%. And with respect to selections, the range is from 22% to 44%.

TABLE 1

RESPONSES TO REPLACEMENT QUESTIONS AND OVERALL REPLACEMENT VALUES

	Taping of Complete Albums	Taping of Selections
Percent of Tapers saying they:		
Would have bought	35%	31%
Would not have bought	45	46
Did not tape	12	12
No answer	8	11
Total	100%	100%
Overall Replacement Value*	40%	35%

---

* Replacement value = Would have bought/(Would have bought + Would not have bought + No answer).

TABLE 2

REPLACEMENT VALUES AS A FUNCTION OF DEMOGRAPHICS

	Taping of Complete Albums	Taping of Selections
Sex		
Male	44%	33%
Female	35	38
Age		
10-19	44	40
20-34	44	37
35+	30	26
Census Region		
Northeast	41	32
North Central	32	32
South	40	40
West	49	38
Family Income		
Under $10,000	29	34
$10-$20,000	52	44
Over $20,000	38	28
Marital Status		
Married	38	37
Never married under 20	44	40
Never married over 20	41	22
Education		
Less than high school	40	35
High school graduate	43	42
More than high school	33	28

SAMPLE AND WEIGHTING -- THE QUESTION OF REPRESENTATIVENESS

As mentioned earlier, the utility of the obtained replacement values depends heavily upon the extent to which the sample can be projected to represent the population of current U.S. music tapers. We saw above that the survey was completed by 3,264 respondents age 10 and older. Like most mail panel samples, the respondents are not fully representative of the entire U.S. population. Table 3 (page 13) compares the demographics of the respondents to those of the total U.S. population (age 10 and over). It can be seen that consistent with previous analyses of mail panel respondents, blacks, young singles and people from lower income and education groups are underrepresented, while women and married people are overrepresented. Thus, it is not surprising that in contrast to the 21% of the U.S. population who are current music tapers, only 13% of the panel sample (429 people) are current music tapers. These findings point out the importance of weighting the sample to bring it into balance with the U.S. population. Unfortunately, the small number of black respondents makes it impossible to weight them up to the population parameters and thus the decision was made to consider only the nonblack respondents and to balance the sample to the nonblack U.S. population (age 10 and older).

Table 4 (page 14) compares the nonblack balanced panel sample to the nonblack U.S. population and shows the effects of a standard weighting model based on age, sex, income and census region. First, it is important to note that the percent of current music tapers has increased to 19% in the weighted sample. Second, the weighting procedure successfully brings the sample into balance with the nonblack U.S. population for most demographic characteristics. However, it can be seen that the weighted panel sample still slightly underrepresents those with less than a high school education.

Although the weighting model was successful in attaining the expected percent of music tapers and in matching the demographics of the nonblack population, this does not guarantee that the demographic characteristics of the tapers in the panel sample will be brought into balance with those of nonblack tapers in the U.S. population. Table 5 (page 15) compares the demographics of the weighted panel of tapers to the demographics of the nonblack U.S. tapers obtained in the 1980 WCI survey. It can be seen that in general the weighting procedure was quite satisfactory. Note, however, that there is again a small problem with respect to education. In this case, high school graduates tend to be overrepresented in the panel at the expense of those with more than a high school education.

To summarize, based on the comparisons in Tables 3 to 5, the weighted sample of tapers, though not perfect, appears to provide a satisfactory representation of the population of nonblack tapers. While the use of only nonblack respondents could be problematic, it is important to note that the probability of taping is unrelated to race (WCI Home Taping Survey, p. 28). That is, blacks comprise 11% of the population and represent 11% of current music tapers (Id.). Since blacks represent such a small percent of tapers, their reports of replacement would have to differ radically from those of the nonblack respondents to produce a significant shift in the overall replacement values. Based on a consideration of the relationships between race and reasons for taping and sources of taping, there is little reason to expect such major differences in replacement values. Thus we do not expect that the obtained overall replacement values would differ if blacks were included in the sample. It is therefore reasonable to use this weighted nonblack sample as a bais for developing replacement values.

TABLE 3

DEMOGRAPHIC COMPARISON OF TOTAL POPULATION

	Percent of Total U.S. Population 10 and Older	Percent of Total Unweighted Panel 10 and Older
Race and Sex		
Black male	5%	1%
Black female	6	1
Nonblack male	43	44
Nonblack female	46	54
Total	100	100
Age		
10-19	21	16
20-34	29	21
35+	50	63
Total	100	100
Census Region		
Northeast	25	27
North Central	25	29
South	33	25
West	17	19
Total	100	100
Family Income		
Under $10,000	39	16
$10-$20,000	29	40
Over $20,000	32	44
Total	100	100
Marital Status		
Married	51	65
Widowed	9	4
Separated/divorced	8	5
Never married under 20	20	16
Never married over 20	12	10
Total	100	100
Education		
Less than high school	40	23
High school graduate	31	39
More than high school	29	38
Total	100	100
Current music tapers	21%	13%

TABLE 4

DEMOGRAPHIC COMPARISON OF NONBLACK POPULATION

	Percent of Nonblack U.S. Population 10 and Older	Percent of Nonblack Weighted Panel 10 and Older
Sex		
Male	48%	48%
Female	52	52
Total	100	100
Age		
10-19	20	19
20-34	29	28
35+	51	53
Total	100	100
Census Region		
Northeast	25	26
North Central	25	25
South	32	30
West	18	19
Total	100	100
Family Income		
Under $10,000	36	33
$10-$20,000	29	31
Over $20,000	35	36
Total	100	100
Marital Status		
Married	54	57
Widowed	8	5
Separated/divorced	8	6
Never married under 20	19	20
Never married over 20	11	12
Total	100	100
Education		
Less than high school	37	27
High school graduate	30	38
More than high school	33	35
Total	100	100
Current music tapers	21%	19%

TABLE 5

DEMOGRAPHIC COMPARISON OF NONBLACK TAPERS

	Percent of Nonblack U.S. Tapers 10 and Older	Percent of Nonblack Weighted Tapers 10 and Older
Sex		
Male	56%	57%
Female	44	43
Total	100	100
Age		
10-19	30	31
20-34	44	42
35+	26	27
Total	100	100
Census Region		
Northeast	23	29
North Central	28	23
South	27	29
West	22	19
Total	100	100
Family Income		
Under $10,000	21	22
$10-$20,000	31	35
Over $20,000	48	43
Total	100	100
Marital Status		
Married	41	43
Widowed	2	2
Separated/divorced	9	6
Never married under 20	30	32
Never married over 20	18	17
Total	100	100
Education		
Less than high school	32	29
High school graduate	22	34
More than high school	46	37
Total	100	100

CONCLUSION

The above findings concerning replacement values should make it abundantly clear that there is no such thing as one "replacement value." As seen above, the likelihood that taping is a replacement for the purchase of a prerecorded album or selection varies considerably with the demographic characteristics of the taper as well as with whether the taped material is a complete album or a selection. Moreover, as was pointed out in the Introduction, we would expect even greater variability in the likelihood that taping replaces sales depending on the reason for taping, the source of the taped material and the type of music being taped. Nevertheless, if one is willing to assume that the tapers in the present sample are representative of nonblack tapers in the U.S., the overall replacement values found in this study are reasonable estimates of the values that would have been obtained from a weighted average across all possible reasons, sources and types of music. Although there are systematic biases in the types of people who respond to mail panel surveys, a standard weighting procedure did bring the demographics of the sample into balance with those of the nonblack U.S. population. Thus, we feel that the replacement values obtained in the study would not differ greatly from those obtained from a truly random sample of the U.S. population. That is, we would expect that the percent of respondents reporting that they would have purchased the last album or selection they taped had they been unable to tape it would be 40% for albums and 35% for selections.

WCI Consumer Research
April 1982

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Submitted May 14, 1982

COMMENTS ON THE STATEMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AND OF ALAN GREENSPAN BEFORE THE SENATE COMMITTEE ON THE JUDICIARY 87TH CONGRESS, 2D SESSION, APRIL 21, 1982

BY

ELECTRONIC INDUSTRIES ASSOCIATION
CONSUMER ELECTRONICS GROUP

In their testimony, Stanley M. Gortikov and Alan Greenspan, on behalf of the Recording Industry Association of America (RIAA), argue that there is a massive amount of home audio taping and that this home taping is doing great injury to the recording industry because it allegedly displaces sales of prerecorded discs and tapes. RIAA also urges that this problem should be remedied by passage of legislation that authorizes placement of a royalty tax on the sale of recording equipment and blank tape.

The available data simply do not support their conclusions about the magnitude of the problem. Their estimates of both the amount of home taping and its impact on the sales of prerecorded music are significantly overstated. Additionally, the remedy of a copyright royalty tax urged by the RIAA has important shortcomings that the RIAA has refused to acknowledge.

PROBLEMS WITH THE RIAA ESTIMATES OF DAMAGE

How Much Home Taping Really Occurs?

The RIAA's discussion of the amount of home taping is based primarily on a 1980 consumer survey by Warner Communications, Inc. (Warner Survey) that is included as part of the RIAA statement. In this survey members of private households were asked how many blank tapes they purchased during the year, how many blank tapes they used, how much time they spent recording, the content of the tapes they recorded, and the source of the material they recorded. Their responses were the basis of the Warner Survey estimation of the amount of home audio taping.

The facts indicate that the people interviewed in the Warner Survey may have exaggerated. The Warner figure for national purchases of blank tapes is calculated from responses to the survey and is dramatically larger than the data on actual factory sales. Table 1 shows the comparison of the estimates of annual purchases of blank audio cassettes and 8-track cartridges with total factory sales of each type of blank tape as reported by the March, 1982, Merchandising Magazine. The Warner estimates of cassette purchases exceed total cassette sales by 18%; 8-track cassette buyers overestimated by much more -- the Warner estimate of purchases is 460% of actual sales. The exaggeration is even larger as business bought some of the blank tapes included in total factory sales.

In general, asking people to recall their past behavior does not always generate reliable data, even when the survey is carefully done. For example, a survey conducted in 1978 by the Roper Organization for the National Music Publishers Association and the RIAA (included in the RIAA statement) asked people how many records they had purchased in the past year. Here is the Roper evaluation of the responses:

> Quite clearly, people exaggerated their purchases of LP records in the past twelve months. Projections from reported purchases of LP records would put total sales at 574 million, when in fact sales were more likely in the 350 million area. (Known sales in '78 were 341 million.) (p.7)

Table 1. BLANK TAPE SALES

	Warner Survey Units of Blank Tape Purchased (in Millions)	Merchandising: Total Factory Sales (in Millions)
Cassette	257.5	218.7
8-track	79.1	17.2

Note: WCI Survey data is for the twelve months ending in June of 1980. Merchandising Magazine data is given for calendar years; figures in the table are the average of 1979 and 1980 total factory sales of blank cassette and 8-track tape.

If people exaggerate the number of tapes they purchased, would they not also exaggerate the amount of taping they did?

What is the Actual Impact of Home Taping?

Having developed estimates of the total amount of home taping, RIAA next tried to estimate how much was lost by consumers substituting taping for purchases of prerecorded music. Several estimates are cited, but the most weight is placed on Dr. Alan Greenspan's estimate that home taping displaced record and prerecorded tape sales approaching $900 million in 1981, and caused an additional $150 million loss due to depressed prices. Dr. Greenspan, however, ignored two major factors in developing this estimate.

- The estimate of how home taping substitutes for recorded music takes little account of the kind of material taped or of the use made of tapes. No direct consideration is given to the evidence that nearly half of all taping is of selections rather than albums, that nearly half of all tape players are portable or in cars so that records are not a substitute for tapes, and that many titles are not available on prerecorded tapes.

- The estimate of the impact of home taping on the recorded music industry completely ignores the fact that home taping can increase sales of recorded music. Some recorded music taped at home will have been bought in order to be taped.

Some Home Recorded Tapes Are Not Substitutes for Products Available in the Market

Dr. Greenspan constructs his estimate of sales displaced by taping by assuming that 55 percent of all home recordings made from borrowed records, 30 percent of tapes made from the taper's own records or tapes, and about a third of taping off-the-air substitute for purchases of prerecorded music. These numbers are said to be based on "available data," but since no citation is given, the derivation of the figures cannot be analyzed. Presumably they are based on survey responses. If so, their reliability depends on just how the survey questions were phrased. In any case, it is notoriously difficult to get reliable answers when asking respondents to speculate about what purchases they would have made in hypothetical situations, that being a harder task than reporting on actual purchases. As noted above, data from surveys about actual purchases are significantly overstated.

An additional reason to believe those numbers are overstated is the number of circumstances in which a record or prerecorded tape cannot substitute for the music being taped at home.

- A customized home tape of selections is not available in recorded form. Buying several albums or singles to get the same selections would be very expensive. Warner found that 45 percent of all home taping was of selections rather than complete albums.

- A tape made to be played on a portable or car tape player does not substitute for a record. In 1978 the Roper survey found that 48 percent of all tape players were portable or car units, and that proportion surely is increasing.

- A home tape made for use in a tape player of a title unavailable commercially on prerecorded cassettes has no substitute. In 1981, 49 percent of the new classical LP listings in the Schwann-1 Record and Tape Guide were unavailable on prerecorded cassettes, and 44 percent of the new non-classical LP listings were unavailable on prerecorded cassettes.[1]

Taping Also Can Increase Sales of Prerecorded Music

Purchasing records and home recording can be complements not substitutes. Considering how many people are using car and portable tape players and the quality and availability problems with prerecorded cassettes, buying records from which tapes can be made probably is an important contributor to the demand for records. The Warner Survey found that fully 45 percent of all home recordings of complete albums and a third of all home recordings of selections were made from records or tapes owned by the tapers themselves. The value to those people of having the home recorded tape provided one reason to buy those records and prerecorded tapes in the first place.

It is hard to estimate the extent to which home taping stimulates the demand for recorded music. Because surveys have ignored this behavior, they have not collected all the information needed for such an estimate. What evidence exists does suggest that home taping may be an important stimulus for record sales. First, if taping were always simply a substitute for purchasing records, tapers might be expected to purchase fewer records than those who do not make home recordings. The opposite is the case: the Warner Survey found that the average taper spent about 70 percent more on recorded music than the average buyer of recorded music who did no taping. Second, the CBS Survey included as part of the RIAA Statement found that tapers did buy a substantial number of albums "specifically to tape," and presumably the decision to purchase still other albums was encouraged because tapes could be made. In short, home taping is not simply a substitute for purchases of recorded music; some prerecorded music is purchased in order to be taped.

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[1] Tape manufacturers also point out that virtually all prerecorded cassettes use the lowest quality (D) grade tape, while the best selling blank tapes are of a higher quality (B grade). Thus, even if a prerecorded cassette is available, it may not be high enough quality to be the product the consumer wants.

PROBLEMS WITH THE PROPOSED REMEDY

Whatever the amount of home taping for which copyright holders are uncompensated, the proposed copyright royalty tax is a very poor choice of a remedy for four basic reasons. First, tapers who never tape copyrighted material will nonetheless pay substantial amounts per year under the RIAA proposal. Second, the actual implementation of the tax will be very difficult, regardless of whether the Copyright Royalty Tribunal (CRT) or Congress ultimately determines the level and nature of the tax. Third, imposition of the tax will pose significant enforcement problems. Finally, payment of a royalty tax will not adequately substitute for market compensation. Instead it will impose an inequitable tax on consumers and distribute the proceeds without due regard for actual lost compensation caused by home taping. For all these reasons Congress should take a much harder look at both issues and the remedy before proceeding any further.

The Copyright Tax Would Affect a Large Amount of Audio Taping of Noncopyrighted Material

A royalty fee on tape recorders or blank tapes will be assessed equally on all users regardless of whether they tape copyrighted music. Contrary to the assertions of David Ladd, there is a great deal more taping of noncopyrighted material taking place than advocates of the tax have admitted. To begin with, the surveys relied upon by RIAA indicate that from one-fourth to one-third of all home taping is either of personal or family events or for school and office use. While RIAA has not released the questionnaire or the interviewer's instructions for the Warner survey, it is likely that some home uses of audio tape and tape equipment were either poorly covered or excluded. Among the uses of audio taping equipment and blank tapes that are not necessarily picked up by the surveys are telephone answering machines, dictating equipment, and home computers that use cassettes and cassette recorders for storing programs.[2] All of these uses would be taxed by the copyright royalty, in spite of the fact that they do not infringe on musical or other copyrights. Further, as only households were surveyed, the results do not begin to cover business uses, which are ubiquitous.

The RIAA spokesmen have argued that the manufacturers of audio tapes and taping equipment could pass on the tax selectively to avoid imposing it on many of these noninfringing uses. This is simply not possible, however, because the equipment and the tapes are identical. The same machine that is used by many families is also used for a variety of business purposes such as dictation, business meetings, and press interviews. That same machine is also used as an adjunct to a home computer to store both programs and data. Moreover, the same tape can be used there and in many telephone answering machines.

Problems of Designing the Tax and its Size

There are substantial problems in designing a tax on blank audio tape and audio tape recorders that will both be equitable and raise the desired revenue. These problems would become insurmountable if the tax attempted to raise the amount the recording industry claims is the value of copies of recorded music being taped or the value of displaced sales of recorded music.

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[2] According to the Warner Survey (p. 12), respondents were given three categories into which to place their tapes: "(1) school or office work, (2) personal or family recordings, and (3) music and other professional entertainment." These other uses do not fit neatly into any of these categories.

Stephen Traiman, executive director of the RIAA, is quoted in the National Journal of May 8, 1982, as suggesting a tax on blank tapes and recorders might be set at 5 percent. Such a tax, he is quoted as saying, "would generate about $120 million annually in clear profit for copyright holders." In fact, using data in the March, 1982, issue of Merchandising Magazine, it would generate revenue of about $105 million, of which about $73.5 million would be raised by the tax on recorders and about $31.5 million by the tax on blank tape.

The tax on recorders presents particular problems. If, as Mr. Traiman implies, the tax is levied as percentage of price, how should the tax be levied on the many tape recorders that are sold as part of combination audio equipment that may include, in addition to the tape recorder, FM and AM tuners, record players, and stereo amplifiers and speakers? In 1981 such equipment acounted for about 13% of the number of recorders sold and 30% of the value. It will be impossible to tax only the proportion of the selling price, due to the tape recorder, but if the tax is on the total selling price part of the equipment will be taxed that has absolutely nothing to do with audio taping of copyrighted works.[3]

A tax of a fixed amount on tape recorders would be no solution. To raise the same revenue as a 5% tax, the tax would have to be $3.69 per recorder. Such a fixed tax also would distort the market by placing much higher tax rates on low priced recorders, those most likely to be used to tape business and other noncopyrighted materials. Some recorders sell now for as little as $20; a $3.69 tax on them would represent an 18% tax.

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[3] Furthermore, since in many cases this equipment includes a record player, the tax would reduce the sales of record players and of records, and thus the revenue of the recording industry.

Finally, the tax could be placed only on blank tapes. That would avoid the complexities of designing a tax on the many types of recording equipment. To raise the same total amount, however, the tax on blank tape would have to be set at 17%, or on average about 45 cents per blank tape.

All these problems arise with a tax designed to raise $105 to $120 million annually. This is the size of the tax the recording industry claims to be talking about, but in fact if Congress passes the Mathias Amendment the industry could ask the CRT to levy a much higher tax. The RIAA seeks the tax to compensate the recording industry for the value of copyrighted, recorded music that is being copied without compensation, and the value of recorded music sales that are being displaced by these home recordings. The RIAA estimates that $2.85 billion is the value of copyrighted, recorded music that is being copied, and $1.05 billion is the value of displaced sales.

To raise $1.05 billion dollars a year, a 50% tax would have to be placed on recorders and blank tape, or an average tax of $1.28 per tape and $36.89 per recorder.[4] To raise $2.85 billion a year, a 129% tax would have to be placed on recorders and blank tapes, or an average tax of $95.66 per recorder and $3.31 per tape. Apart from the burdens of such a tax, obviously the higher the tax on recording equipment, the greater the market distortions it is likely to cause.

A Copyright Royalty Tax Would Be Difficult to Enforce

The proposed legislation calls for a tax on audio recording devices and media. It does not specify the nature of the media, but it would appear that prerecorded audio tapes or bulk magnetic tape not specifically packaged for audio use would not be taxed. This would provide an incentive for practices that circumvent the tax.

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[4] All these calculations are based on 1981 data; the RIAA estimates are based on 1980 and 1981 data.

- Firms could fill tapes designed for home recording with prerecorded material, solely to avoid imposition of the tax. Although the royalty legislation purports to tax this activity based on the intent of the manufacturers, in practice it would be impossible to differentiate between "legitimate" and "illegitimate" uses of material. Unless the tax on blank tapes were very small, such prerecorded tapes might be less expensive than similar grades of taxed blank tapes.
- Firms may purchase blank magnetic tape to manufacture into cassettes or cartridges and then sell these products on the black market without paying the copyright tax. Since cassettes can be assembled on a small scale, it would be difficult to stop this practice, which would be very costly to law-abiding manufacturers who would pay the tax. Assessing the tax on blank magnetic tape would tax an even broader range of uses that have nothing to do with copyrighted works, unless a complex system of rebates were created.

The likelihood that these practices would arise will depend on the magnitude of the royalty tax. If the CRT were to set the tax on the basis of the case presented by RIAA, the enforcement problems would be overwhelming.

The Proposed Remedy Would Not Serve the Purposes of the Copyright Laws

The royalty taxes must be distributed to the copyright holders whose music is actually being taped for the purpose of the copyright laws to be served. If payments to the music industry are not closely related to which copyrighted materials are being used, the payments will neither be equitable nor stimulate the creation and recording of new musical works that consumers want. Windfall increases in the music industry's profits will not automatically lead to an increase in future creative effort and music production. More effort will only be forthcoming in the future if future rewards depend on those efforts. And that effort will only be directed at pleasing consumers if the future rewards are tied to what consumers want. It is very doubtful that the royalty tax can be distributed to provide the expectation of future compensation that is so necessary to stimulate future creative efforts.

Several factors cause the distribution of this tax to be problematic, and far more complex than any compulsory license previously created by Congress.

- Information on which recordings are being taped cannot be collected easily. This information could only be obtained by frequent sampling of home taping. This process would be both very costly and imprecise. It could not take into account the degree to which taping of some records stimulates record buying. Distributing the royalty tax proceeds on the basis of imprecise knowledge of lost sales would overcompensate some copyright holders and undercompensate others. These problems are much greater than those created by the compulsory licenses currently in existence that cover far more easily observable public uses of copyrighted material. Cable television retransmission, the most complex of existing activities subject to a compulsory license, can easily be monitored, and the holders of copyrights can stake their claims based on knowledge of actual use of their material.

- Two sets of copyrights must be unravelled in the process of distributing the royalty tax: the copyright on the musical composition and the copyright on the sound recording. By contrast, the existing compulsory licenses on music i.e. the jukebox and mechanical licenses, must compensate only the copyright on the composition. These royalties can be distributed by the performing rights societies, which were established to distribute negotiated copyright fees for live performances and broadcasts. No such organizations have been set up to allocate copyright fees to the potential claimants on the share of fees that would go to the holders of copyrights in the sound recordings.
- The CRT has in the past largely relied on voluntary agreements for the distribution of royalty taxes among broad groups of claimants, e.g. NAB, MPAA. It is quite likely that agreements of this nature would not be reached in the case of home audio recording. The number of parties involved and the conflicting interests may be far greater than in previous proceedings, and the difficulty of collecting good data on home taping practices could exacerbate conflicts among the parties. ASCAP, BMI, and SESAC, the performing rights societies that would be parties to a home audio taping proceeding, were not even able to agree on the distribution among themselves of cable compulsory license fees, and had to turn to the CRT to divide their share of these fees.
- Performers may very well not receive much additional compensation from the royalty tax since, in the absence of information on taping of specific records, the tax distributed to record companies is likely to be based on their overall market share. Under their existing contracts with record companies, performers may not be

entitled to any share of a royalty tax distribution that is not directly traceable to the recordings they made.

CONCLUSIONS

The recording industry has presented what may appear to be a superficially plausible case that home taping is causing them great harm and that a simple remedy would be to assess a copyright royalty tax on all recorders and blank tapes. Closer examination of the alleged harm and the workability of the proposed remedy reveals flaws in both. Congress should carefully evaluate whether the present condition of the recording industry is due significantly to home taping, or whether other causes are to blame. The economy has been in recession since 1979, and the present state of the recording industry undoubtedly reflects that reality. Indeed, sales of prerecorded music have not fallen by as much as have the sales of audio equipment. Further, the recording industry seems to have been slow to recognize that Americans may have decided to shift their major listening activities away from records and to tape. By not offering sufficient quantities of quality prerecorded tapes, the industry may have pushed consumers into home taping in order to control the music to which they will listen while walking or in the car.

If the Committee concludes that there is an audio taping problem it should evaluate concurrently and comprehensively all reasonable solutions -- not merely remedies that exclusively burden manufacturers of blank tape or audio recorders. A large part of home taping that may reduce compensation to copyright holders is from taping off the radio. The problem presented by taping of albums off-the-air can in part be traced to the absence of protection to the copyright owner of sound recordings for broadcasts or other performances of that recording. This hiatus allows radio stations to play record albums without commercial interruption, which, while beneficial to their ratings, may encourage home taping without compensating either the record company or the performers. If the record company could negotiate directly with radio stations, it could control broadcasts that lend themselves to home taping, and receive payment from radio stations where appropriate.[5] The record companies could time the release of new albums so as to maximize publicity, but limit home taping by first releasing albums to stations that would interrupt the albums with commercials. Later, after sales reached a certain level, they could then offer the albums for broadcasts without commercial interuption.

Clearly radio stations that play recent albums on a commercially uninterrupted basis and heavily promote this practice contribute to, and indeed may encourage, a substantial amount of audio taping. Indeed, the causal relationship between these practices and audio taping may be more direct, and more substantial than any nexus between audio taping and manufacturing and marketing of audio recorders or audio blank tapes -- products that have significant uses other than recording copyrighted music. Thus, the contribution of broadcasters to the potential audio taping problem should at least not be ignored by this committee. Any fair and equitable "solution" to a problem -- which we do not, of course, concede is substantial enough to require imposing _any_ remedy -- must be equitable in its effects on all potential contributers to the problem.

Whatever harm may actually be due to home taping, Congress should also examine very closely the details of the proposed new tax it is being asked to impose. The whole basis of the copyright system is simple: reward copyright holders for the use of their works in order to encourage further creations. The proposed tax cannot be limited either to those who use copyrighted materials nor can its proceeds be paid to only those whose copyrighted works have been taped. The result serves neither users nor copyright holders.

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[5] A compulsory license for broadcasts of sound recordings, which has been suggested in the past, would not serve the same purpose, as it too would deny copyright holders control over their property.

In summary, the Committee should fully consider all potential causes of the current condition of the recording industry and all potential alternatives before it decides that any remedy to an audio taping "problem" is required and that any "solution" should be restricted to manufacturers of audio recorders and audio tape.

Senator **Mathias**. Thank you, Dr. Greenspan. Your testimony is very thoughtful and it suggests some conflicts with testimony of several of the previous panels. I think what I would like to do is analyze the various conflicts that do occur and then come back to you with some written inquiries.

Dr. **Greenspan**. Certainly.

Mr. **Gortikov**. Mr. Buddy Draper, executive director of the Muscle Shoals Music Association, is our next witness.

Senator **Mathias**. Mr. Draper was introduced nunc pro tunc by Senator Denton, whose introduction will appear in the record at this point.

[The introduction was received for the record:]

INTRODUCTORY STATEMENT BY JEREMIAH DENTON BEFORE THE FULL JUDICIARY COMMITTEE ON THE BETAMAX BILL, S. 1758

Mr. Chairman: It is one of my great privileges to welcome Alabamians to the Capitol of the United States. Today, it is my particular pleasure to welcome Mr. F. E. (Buddy) Draper from Muscle Shoals, Alabama. Mr. Draper has long devoted himself to national and civic service. He served in the United Marines corps for twenty years. He went on to become a bank president in Shefield, Alabama, and, later mayor of that fine city.

Mr. Draper is here today in his capacity as Executive Director of the Muscle Shoals Music Association. It is not that widely known, but Muscle Shoals, Alabama, is second only to Los Angeles and Nashville in the size of its recording industry. It is home to well over 20 recording studios which, on the average, annually produce over $30 million record sales.

As Executive Director of the association of some 600 artists, producers, and publishers, Mr. Draper is both a business and a community leader and I believe his experience and knowledge will contribute to our understanding of the issue before this Committee today.

I want to welcome Buddy and commend his testimony to the other members of our Committee.

Mr. **Draper**. Thank you, sir.

Mr. Chairman, we are located in Muscle Shoals, Ala. We are the hit recording capitol of the world, the third largest recording center in the entire United States, and the home of some 30 recording and publishing firms. Among the many stars who have recorded in Muscle Shoals are: Paul Anka, Eddie Arnold, Mac Davis, Aretha Franklin, Mary MacGregor, Liza Minelli, The Osmonds, Lou Rawls, Rolling Stones, Paul Simon, Rod Steward, Bob Seger, Bob Dylan, and on and on.

The Muscle Shoals Music Association is made up of more than 800 members. Most of them are employed full time in the music industry. They are songwriters, musicians, artists, engineers, recording company executives, and employees. They are the people whose creative talents, hard work, and experience give birth to the wide array of music that is enjoyed every day of the year by Americans young and old.

Our members and the rest of the American creative community need the Mathias amendment. We need a system that will compensate us for the home taping of our music. We, like thousands of other Americans in the recording industry, get paid for our creative efforts largely through the sale of records.

In northern Alabama, a lot of our friends are out of work. Three auto plants are depressed, and one has already announced its closing. We see the hurt every day from an industry where sales have been displaced, but unlike the automobile industry, our record sales are down because somebody else is selling our records. Our sales are down because somebody else is selling machines and tapes that make it possible to tape our records for free. And, unlike cars, we do not get paid all at once when somebody buys our product. We get paid a little bit each time a record is sold. Our people do not earn a penny when their works are taped off the radio or from borrowed records.

In the last few years, taping has really taken off. Today, anyone who can work a toaster can tape a record. As a result, millions of Americans are deciding not to lay out the cash for a record and instead are taping songs from the radio, from records borrowed from friends, or from record rental stores.

Dr. Greenspan has given you many figures, and I think they are all very pertinent to this overall situation. So let me give you some other figures.

In 1976, the award for the best-selling album of the year went to an album that sold almost 7 million copies. In 1979, that same award for the best-selling album went to a record that sold only a little bit more than 4 million copies. But in 1982, a comparable recording on the market has just finished spending 6 weeks at the top of the Billboard album chart—the same amount of time that the award-winning album of 1979 was there—but current sales for the new album have not yet reached 1.7 million units.

These figures are staggering. They are staggering to us, and I think should prove staggering to the general public. But what do those numbers mean for the men and women I represent? They mean that a songwriter or a composer can spend days, weeks, or months creating a song, and years getting it published, and even more time getting it recorded, and then millions tape it for free. They mean fewer changes for songwriters' songs to be recorded, for performers to create recordings, for the unknowns to become known.

We are not asking you to stop people from taping music; far from that. Our members want their music played in as many American homes as possible. We deserve, however, to get paid for making records. We ask you to keep the copyright system up to date with technology. Home taping really hurts the little guys—songwriters, performers, independent producers—if they are not compensated when their creative work is taken through home taping, they cannot survive.

The Mathias amendment is a sensible compromise. It is truly fair to everyone concerned. It is fair to our members, and it is fair to the American consumer.

I would like to add in closing that many times, many of these people here as witnesses today have stressed that time is of essence, and it is, for I fully believe in my own mind, there in Muscle Shoals, Ala., that unless something is done to help us, that many of the 30 publishing firms and recording studios will go by the wayside within the next 2 years.

Thank you, sir.

Senator MATHIAS. Thank you, Mr. Draper.

[Prepared statement of Buddy Draper follows:]

STATEMENT OF MR. F.E. (BUDDY) DRAPER
BEFORE THE UNITED STATES SENATE COMMITTEE
ON THE JUDICIARY

APRIL 21, 1982

Mr. Chairman, members of the Committee, my name is Buddy Draper. I appreciate this opportunity to summarize my views on the home taping of recorded music and to express my strong support for Senator Mathias's amendment to Senate Bill 1758.

I am the Executive Director of the Muscle Shoals Music Association. We are located in Muscle Shoals, Alabama. We are the "hit recording capital of the world," the third largest recording center in the United States, and the home of some 30 recording studios and publishing firms. We have the world's largest recording complex under one roof. Among the many stars who have recorded in Muscle Shoals are: Paul Anka, Eddie Arnold, Bill Haley and the Comets, Mac Davis, Aretha Franklin, Mary MacGregor, Liza Minnelli, The Osmonds, Lou Rawls, Rolling Stones, Paul Simon, Rod Stewart and Andy Williams.

The Muscle Shoals Music Association is made up of more than 800 members. Most of them are employed full time in the music industry. They are songwriters, musicians, artists, engineers and record company employees. They are the people whose creative talents, hard work and experience give birth to the wide array of music that is enjoyed every day of the year by Americans young and old. They write, play and record the tunes that are a basic ingredient of American cultural life, the songs that set the standard for entertainment the world over. Truly, music is a universal language.

Our members -- and the rest of the American creative community -- need the Mathias amendment. We need a system that will compensate us for the home taping of our music. Like thousands of other Americans in the recording industry, we get paid for our creative efforts largely through the sale of records.

In Northern Alabama, a lot of our friends are out of work. Three auto plants are depressed. We see the hurt every day from an industry where sales have been displaced.

But unlike the automobile industry, our record sales aren't down because somebody else is selling records. Our sales are down because somebody else is selling machines and tapes that make it possible to tape our records for free. And, unlike cars, we don't get paid all at once when somebody buys our product. We get paid a little bit each time a record is sold. Our people don't earn a penny when their works are taped off the radio or from borrowed records.

In the last few years, taping has really taken off. Today, anyone who can work a toaster can tape a record. As a result, millions of Americans are deciding not to lay out the cash for a record and instead are taping songs from the radio, from records borrowed from friends or from record rental stores.

Mr. [illegible]

You have heard all the numbers:

- 450 million albums are being taped each year
- About 49 percent of those tapings directly displace the sale of record albums
- Nearly $1 billion a year in lost record sales

Let me give you some other figures. In 1976 the award for the best selling album of the year went to an album that sold almost seven million copies. In 1979 the same award was won by an album that sold only a little bit more than four million copies. In 1982 a comparable recording has just finished spending six weeks at the top of the Billboard album chart -- the same amount of time that the award winning album in 1979 held that spot. Current sales for the new album have not yet reached one million, seven hundred units.

The figures are staggering. But, what do those numbers mean for the men and women I represent? They mean that a songwriter or a composer can spend days, weeks or months creating a song, and years getting it published, and even more time getting it recorded -- and then millions tape it for free. They mean fewer chances for songwriters' songs to be recorded, for performers to create recordings, for the unknowns to become known.

We are not asking you to stop people from taping music. Our members want their music played in as many American homes as possible. We deserve to get paid for making records. We ask you to keep the copyright system up-to-date! [illegible] Home taping really hurts the little guys -- songwriters, performers, independent producers. If they aren't compensated when their creative work is taken, through home taping, they cannot survive.

The Mathias amendment is a sensible compromise. It is truly fair to everyone concerned. It is fair to our members and it is fair to the American consumer.

Mr. **Gortikov**. Next, Senator, we introduce Mr. Victor Fuentealba, who is president of the American Federation of Musicians.

Senator **Mathias**. And an old friend of mine.

Mr. **Fuentealba**. Thank you, Senator.

Mr. Chairman, I am also here in my capacity as President of the National Music Council, which is an organization consisting of the 60 leading musical organizations throughout the United States.

Normally, Mr. Gortikov and I are on opposite sides of the table. But today, we are seated together in a common cause: supporting your amendment.

Senator **Mathias**. I think in some previous conversations that you and I have had, the differences between you have been apparent. So I am delighted to see this rapprochement this morning.

Mr. **Fuentealba**. But, Mr. Chairman, unless this legislation is passed, as you have introduced, the continued home taping that has been a problem for many years and is increasingly growing worse is going to drastically affect the job opportunities and the incomes of the professional musician, the musician who is not fortunate enough to make recordings, and also the general public. And I would like to explain why.

Technological developments have been a problem with the professional musician from time immemorial. And when the phonograph record was perfected in the late 1930's and the early 1940's, Jimmy Petrillo, who was then president of our union and who, incidentally, celebrated his 90th birthday a few weeks ago, made the decision that something had to be done to protect the professional musician from the inroads of recordings. A 2-year strike resulted against the recording companies in the early 1940's, and as a result of that strike, a unique fund was created called the music performance trust fund. The record companies contribute to this fund based on the list price of the record and the number of sales of the record, and that money is used to provide free performances for the general public throughout the United States and Canada. Last year alone, there were 75,000 performances that were given free to the public throughout the United States.

In addition to that, in later years, another fund was created, again financed by the sales of records, to compensate the musicians who created the records. This was called the special payments fund. Both of these funds are equivalent in contributions. Last year, for example, $19 million went to the musicians who made the records through the special payments fund, and $19 million was utilized to pay for free performances throughout the United States and Canada.

With each record that is sold, the fund receives a contribution. For every record that is not sold, for every record that is taped at home, we lose. The professional musician who made the record loses. The professional musician who would be playing one of the free performances throughout the country loses; and the public loses. So we are vitally interested in this amendment. We feel that the amendment is a solution to the problem—a problem which is consistently growing worse. And we are in full support of your amendment to this legislation.

Senator **Mathias**. Thank you very much.

Let me take this opportunity to ask you to convey the best wishes of the committee to Mr. Petrillo. He was not always popular, but I think as we look back on that stormy period in the entertainment and music business, that we recognize the extraordinary way in which he represented his constituency, and that is something that is respected, I think, in a very real way.

Mr. **Fuentealba**. I certainly will do that, Senator.

[Prepared statement of Victor W. Fuentealba follows:]

STATEMENT

OF

VICTOR W. FUENTEALBA, PRESIDENT

AMERICAN FEDERATION OF MUSICIANS

My name is Victor W. Fuentealba and I'm president of the American Federation of Musicians, the largest entertainment union in the world, with a current membership of 280,000. Our members are located in virtually every town and city in the United States.

I am here today in support of the Mathias, Baker, Byrd Amendment 1333 to Senate bill 1758.

Traditionally, musicians have been constantly fighting to protect their jobs and income. Today there are few job opportunities available to enable professional musicians to earn their livelihood without the necessity of engaging in other work. Prior to the invention of the phonograph record, all music was performed live by professional musicians. Music on radio was furnished by staff orchestras in every large city in the United States, and every restaurant and night club that had entertainment utilized live music.

Today, this is no longer true. The staff orchestras in the broadcasting industry are part of history and discotheques have replaced musicians in many clubs.

In the early 1940's, the American Federation of Musicians, under the leadership of Jimmy Petrillo, realized the impact that recorded music would have on the job opportunities of the professional musician. After a lengthy strike, an agreement was negotiated with the record companies creating the Music Performance Trust Funds, financed by contributions from the record companies based on record sales, thus creating a source of employment for musicians to provide free musical entertainment to the public in every community in the United States. Later, another fund was created, the Special Payments Fund, also financed by the sale of records. The proceeds from this fund are distributed to the musicians who are employed in the recording industry.

The very existence of these two funds is dependent on the sales of records. Home taping of records is having an adverse effect on record sales which, in turn, reduces the contributions to these funds. Not only do the musicians suffer, but the public also in that the number of free performances available to the public must be curtailed as the funds decline. Last year, through the Music Performance Trust Funds and matching funds by cosponsoring organizations, over 75,000 performances free to the public were presented and millions of dollars in wages were paid to professional musicians.

Home taping also effects the professional musician in the recording industry, and those who aspire to become recording musicians. Reduced sales of records means reduced income for the companies, with less money to be invested in new recordings.

In my opinion, the greatest danger of legitimizing home taping without any type of royalty or compensation, is the impact on the copyright law which guarantees remuneration to the copyright owner, a concept which is accepted throughout the world. An erosion of this basic right can only serve to jeopardize the current rights enjoyed under the copyright law, and this cannot be tolerated.

The amendment proposed to Senate bill 1758 is, in my opinion, the best solution to the problem at hand. The American Federation of Musicians has joined with a coalition of other interested parties, known as "Save America's Music," to urge passage of this amendment.

We sincerely urge a favorable vote on Amendment 1333.

Mr. Gortikov. Our final witness is Mr. Jack Golodner, who is director of the professional employees department of the AFL-CIO.

Mr. Golodner. Thank you, Mr. Chairman.

I am here today on behalf of both the AFL-CIO and our department, to state our support for your amendment, amendment No. 1333 to S. 1758.

I would like to stress that, unlike other witnesses who have spoken and have appeared before you today, who are concerned with either the video or audio aspects of this bill, we are concerned with both audio and video copying, and we commend you, Mr. Chairman, for recognizing in this amendment that the taping problem can only be dealt with in its entirety if the resolution of this problem is to be fair, rational and consistent.

Constituted as we are in the AFL-CIO family, we must regard your amendment both from the point of view of the many union performers and technicians whose work product is the subject of copying by tape, and also from the vantage point of the large number of individuals, including many of our union members, who engage increasingly in home taping.

We perceive the interests of all of those people, the creators and the consumers, to be wholly compatible with our endorsement of the Mathias amendment.

What we have had to consider, and what this committee and the Congress must consider is a seeming clash of interests. On the one hand, we have weighed—and we ask you to weigh—the very legitimate interest of performers and technicians, who seek to receive a fair return for the benefits others derive by copying their creative work and by manufacturing, importing and selling the equipment that makes such copies.

Further, these creative people want some measure of assurance that the technologies making possible additional use, profits and enjoyment will not be used against them to undermine the industry which produces the original program material and gives them employment.

I think, Mr. Chairman, there is some confusion about the role of the performer and the technician, the people that we represent. They are not selling records or tapes. That is not the product. The product is sound and images. That is what they are trying to sell. And if someone can take those sounds and images, no matter what the medium—tape, record, wire, whatever you say—if they can take that without paying for it, our members will have performed for them without reimbursement.

On the other hand, Mr. Chairman, we, too, have had to consider, and we ask this committee to consider, the general interest in promoting technological change in a constructive manner and insuring that its benefits are shared in a fair manner by the greatest number of people at the lowest reasonable cost. In the short run, these interests, as I have said, appear to be wholly incompatible. But in the long run, the interests of both groups converge. Today's artists are not Luddites—they do not seek to smash the machines. They merely wish a fair return for the increased benefits derived from their work that they can go on working. And the consumers are not so gullible. They know that in the long run, the piper must be paid by someone, and if audio or video works are to be freely copied so that they need not be purchased or transmitted again, then the creators of those works must be given some compensation for the income lost, or they will limit their product, raise its price, and who will win then? The consumer will lose out.

The Mathias amendment provides us with a balancing of these interests. It would legitimize home audio and videotaping of copyrighted materials for in-household, noncommercial purposes, and it would assure that all individuals are able to fully utilize these technologies for their personal benefit. In return, copyright holders would be assured a share of the revenue that is now realized principally by the manufacturers and in porters of video and audio recording equipment and blank tape—revenues that would never exist but for the creators of the works which these machines and tapes copy. What could be more fair?

As I have indicated, Mr. Chairman, in order to arrive at our position, we have had to take into consideration many of the same objections which are now being brought to you in this committee. We also were told, for example, by the mostly foreign manufacturers of tapes and video copying machines that the use of their equipment does not constitute a threat to the creative core of film and video production in this country, because that use is purely for the purpose of so-called time shifting.

Well, what is time shifting? "The Wizard of Oz" is a perennial favorite children's program which appears every springtime on our television sets. If 40 million people tape it during one showing—and there will be 40 million VCR's, we have been told, within a short time—because they wish to have it available when they want to view it, the program will never be transmitted again. There would be no more market for it. So that time-shifting does, in fact, undermine the marketability of these products.

But we are told that the users of this equipment do not stockpile tapes of video programs, do not show them to friends and neighbors, and therefore do not impair the ability of the copyright holder to market their product. In order to accept this argument, we would have to ignore all that we see, all that we hear, and all that we know about human nature. True, experience with home videotaping is limited, so no large statistical base exists to either prove or disprove the degree to which VCR's are being used for so-called harmless purposes. But audio recorders, as the gentlemen immediately preceding me have told you, have been around for some time, and the deleterious effect they have had on the recording industry and those it employs is becoming quite obvious. Taping off the air, taping recordings and copying tapes is fast becoming a common practice. Audio tapes are being stockpiled, loaned, exchanged, and given away. Personal libraries of copyrighted sound programs are being built. Sales are being impaired. And the consumer, the public, our members, are served each year with fewer original products, less variety, and higher prices.

I see that my time is up, Mr. Chairman. In conclusion, I wish to endorse what has been said by the other gentlemen on this panel. Time is of the essence. What is becoming a common practice will be more and more difficult to change later on, if Congress does not act now.

Thank you.

Senator MATHIAS. Thank you very much.

[Prepared statement of Jack Golodner follows:]

Summary of Statement of Jack Golodner,
Director, Department for Professional Employees, AFL-CIO
Before the Senate Judiciary Committee on
The Mathias Amendment (Amendment No. 1333) to S. 1758

April 21, 1982

We are fully aware of the clash of interests presented by audio and video home taping because most of the artists, performers, and technicians who produce the sound recordings and video programming which are increasingly being taped in homes throughout the United States are union members, and many of the individuals who engage in that taping are also union members. Like this Committee and the Congress, the AFL-CIO and the DPE seek a resolution of this clash of interests which on balance best serves the long-term interest of our society. This, we believe, would be achieved by enactment of the Mathias Amendment.

Enactment of the Mathias Amendment would

(1) permit the home taping of copyrighted audiovisual works, thus, providing an exception in copyright law which traditionally awards the copyright owners the right to copy. In this way the Amendment permits the public to benefit from these new technologies; and

(2) establish a system under which copyright owners of these audiovisual works would receive fair compensation for the use of their works and in this way be assured incentives to continue creating and producing such works.

Our economic system and the copyright laws are based on free enterprise. Allowing audio and video home taping of copyrighted materials without recompense to those who create and produce them would subvert that system and could eventually destroy the motivation to create and produce such materials in the future. Everyone — the creators, the manufacturers of copying equipment, the transmitters of the material and the general public -- would lose if this were allowed to happen.

The Mathias Amendment is a fair resolution of the conflicting interests resulting from home audio and video taping and in the best long-term interest of our society. It should be enacted as soon as practicable.

STATEMENT
OF
JACK GOLODNER, DIRECTOR
DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

I am Jack Golodner, Director of the Department for Professional Employees (DPE), AFL-CIO. I am here today on behalf of both the AFL-CIO and the Department to state our support for the Mathias Amendment (Amendment No. 1333) to S. 1758.

The AFL-CIO, I know, needs no introduction to this Committee, but perhaps the DPE does. The Department is made up of 27 national and international AFL-CIO unions (list attached) which represent approximately 2 million individuals employed in virtually every major professional field. Among them are performing artists - musicians, actors, singers, dancers - and the craft and technical people of the arts, entertainment and media industry. Also represented in our Department are engineers, teachers, social workers, pharmacists, nurses, etc. Constituted as we are, we regard the Mathias Amendment both from the point of view of the performers and technicians whose work product is increasingly the subject of copying by tape and from the vantage point of a large number of individuals including union members who engage in home taping. We perceive the interests of all of these people -- the creators and the consumers -- to be wholly compatible with our endorsement of the Mathias Amendment.

Let me take this opportunity to emphasize that unlike many of the other witnesses who will be appearing before you who are concerned either with audio or video taping, the interests and concerns of the AFL-CIO and the DPE involve both audio and video home taping. Union performers and technicians are involved in producing materials which are the subject of both forms of taping by union members and other members of the general public. We strongly commend Senator Mathias for covering both aspects of home taping in his amendment because we believe that dealing with the problem in its entirety is the only fair and rational way to resolve it.

However, to state that the interests of union members are compatible with our support of the Mathias Amendment is not to say that those interests are identical, or, for that matter, even similar. What we have to consider and what this Committee and the Congress must consider, is a clash of interests.

On the one hand we have weighed -- and we ask you to weigh -- the very legitimate interest of performers and technicians, who seek to receive a fair return for the benefits others derive by copying their creative work and by manufacture, importing and selling the equipment that makes such copies. Further, these creative people who are the source of all this bounty want some measure of assurance that the technologies making possible additional use, profits and enjoyment will not be used to undermine the industry, which produces the original program material and gives them employment.

On the other hand we have had to consider -- and we ask you to consider -- the general interest in promoting technological change in a constructive manner and in assuring that its benefits are shared in a fair manner by the greatest number of people at the lowest reasonable cost.

Our objective in resolving this clash of interests is similar to that which you must have, Mr. Chairman, namely to reach a resolution which on balance best serves the long term interest of our society. I believe that this is achieved by the Mathias Amendment.

Viewed from a historical perspective, audio and video home taping are among the latest of a long series of technological advances which have improved the means by which entertainment has been transmitted to audiences. Among their precursors have been sound recordings, motion pictures, radio and television broadcasting, and cable television. These technologies have resulted in exponential growth in audience size but at the same time they have decreased performance opportunities and overall earnings among the artists, performers, and technicians whose performances are transmitted by these technologies. In the main, those controlling these new mechanum for distribution have been the major financial beneficiaries, largely excluding the many artists, performers, and technicians who produce the program matter which attracts the audiences. To a large extent, I attribute this unfair distribution of rewards to the failure to keep our copyright laws up-to-date and responsive to technological change. As you know, Mr. Chairman, the copyright laws remained virtually unchanged from 1909 until they were rewritten in 1976, the period during which all of these technologies came into use.

Enactment of the Mathias Amendment would avoid this mistake of the past by amending the copyright law so as to achieve an equitable balance of interests with regard to the home taping of copyrighted audio and video materials.

Passage of The Mathias Amendment would accomplish two essential things:

- First, it would provide an exception in copyright law which traditionally guards the copyright holders right to copy. It would permit the copying of certain audio/visual works provided the copying or audio/video recording is made for private use in the household of the copyer.
- Secondly, it acknowledges the fact that -- in the long run -- there is no such thing as a free lunch and the truth of the admonition that the piper, indeed, must be paid if he or she is to continue playing. It does this by directing the Copyright Royalty Tribunal to determine appropriate and reasonable royalty fees to be paid by the manufacturers and importers of audio and video recorders and the blank tapes used in them. The proceeds would be used to provide the copyright owners of audiovisual works fair compensation for use of their

Others -- on both sides of the measure before you -- have addressed the first provision. I would like to speak to the second.

As a nation and an economic community we adhere to the basic tenents of the free enterprise system. That is to say, we believe that if individuals are left free to pursue their enterprises and to realize whatever profit derives from their enterprise, they will have the necessary incentive to do more, achieve more, produce more, and the whole of society will benefit.

Suppose, if you will, there were no copyright laws at the birth of our nation. Suppose anyone with a press or other form of duplicating machine were free to take the manuscripts of Twain, Steinbeck, Hemingway and others, copy them on their machines and pass them around to friends and neighbors and mail them off as delightful Christmas presents and birthday gifts. Do you think these authors would have had the incentive to keep writing as they did? Do you believe their publishers would have been encouraged to invest in machines and the buildings to house them in order to reproduce their books, if they knew that nearly everyone could obtain a copy from a friend or relative free of charge?

Suppose, if you will, that a machine were invented that could transmit by wire and over the air perfect replicas of paintings by Robert Indiana, Bob Raushenberg and others. And suppose that another machine was invented that would allow the viewer to capture these replicas on canvas in their own home. Overnight, the works of Americas greatest artists could be transmitted via this system to millions of homes where they would be captured as perfect copies forever. Without doubt most works and certainly the best works would soon be barred from transmission by their creators.

These, of course are fantasies. The power of the printing press to destroy incentives for written creativity was recognized and was controlled. The technology to perfectly transmit and reproduce the subtle complex colors of an original painting does not exist yet in practical terms. But films and sound recordings can be transmitted and can be cheaply and easily reproduced in near perfect copies. These films and sound recordings are works of art. They are the unique products of a collection of authors -- writers, performers, producers, composers, technicians. And, because we wish to preserve for such creative people, appropriate incentives so that they will keep on producing such works --the law grants them the sole privilege of copying their own materials.

If, as we all agree, this major protection for the creators is now to be removed how will the scale be balanced --how are the necessary opportunities for reward and incentives to be preserved.

I submit that the Mathias Amendment is the one approach that has merit. It would legitimize home audio and video taping of copyrighted materials for in-household, non-commercial purposes and it would assure that all individuals will be able to fully utilize these technologies for their personal benefit. In return, copyright holders would be assured a limited share of the profits that are now realized principally by the manufacturers and importers of video and audio recording equipment and blank tapes that would never exist but for the creators of the works which these machines and tapes copy.

What could be more fair?

As I have indicated, Mr. Chairman, in order to arrive at our position we have had to take into consideration many of the same objections which now are being brought to you and this committee.

We were told by the manufacturers of tapes and video copying machines that the use of their equipment does not consitute a threat to the creative core of film and video production because that use is purely for the purpose of so-called time shifting. That is, the home user purchases this equipment mainly so that they can tape programs which are aired at an inconvenient time and play it back for theirselves at a convenient time. We are told that the users of this equipment do not stockpile tapes of video programs, do not show them to friends and neighbors and, therefore, do not impair the ability of the copyright holders to market their product in motion picture theaters and in the form of pre-recorded video cassettes.

In order to accept this argument we would have to ignore all that we see and hear and all that we know about human nature. Experience with home video taping is limited and so no large statistical base exists to either prove or disprove the degree to which VCRs are being used for "time-shifting" purposes. But audio recorders have been around for some time now and we cannot ignore the deterious effect they have had on the recording industry and those it employs. Taping off the air, taping recordings and copying tapes is fast becoming a common practice. Audio tapes are being stockpiled, loaned, exchanged and given away. Personal libraries of copyrighted sound programming are being built. Knowing this, the producers of this material have only two choices: stop producing or raise the price of the original tape or record to compensate for the loss in sales. Either way the consumer, the public, our members suffer.

Is this happening with regard to video copying? I call your attention to an item that appeared in Business Week on January 25. It talks about plans by MGM/CBS Home Video to release a deluxe four cassette package of the tremendously successful Broadway show, Nicholas Nickleby. The price? Three Hundred dollars. According to this article "The distributor claims that the presentation, featuring 40 members of the Royal Shakespeare Co. in 135 different parts will not be seen in any other medium during 1982. But Mobil Oil Corporation will sponsor a four part showing of the recorded version "late this year or early next year" on at least 50 commercial TV stations ... if so", the article continues, "... anyone with a home VCR could copy the telecasts for about $35 worth of blank cassettes."

The handwriting is on the wall. Must more damage be inflicted on our creative community before Congress -- too late -- bestirs itself?

Another objection sometimes heard is that passage of the Mathias Amendment will simply help make wealthy recording companies and film producers even richer, and the already rich performers, writers and composers they employ wealthier.

The coverage of our copyright laws is not dependent upon the economic situation of the creator and copyright holder. The issue obviously is a smokescreen and must be dismissed as such even if the premise were true. And the premise is not true. Neither I, nor the AFL-CIO, nor the Department for Professional Employees are concerned with making the rich richer. What does concern us is the miserable economic state of most of America's creative and performing artists, the marginal unstable nature of the industry that employs them, and the inability of these people to realize some economic reward despite the fact that, through film, recordings, and tape, they now serve hundreds of millions with their art. They have not been able to share in the profits made from their labors because the law - the copyright laws in this country - are blind to the new technologies and seem to care little - despite much lip service - for the talents that create and perform.

In 1977 and again in 1981 studies funded by the U. S. Department of Labor, the National Endowment for the Arts, and the Ford Foundation were made of the economic status of America's performing artists. Both studies document the high unemployment, poor pay, and lengthy and expensive training that marks the performer's career. A few quotes from the latest report* completed last December will give you a picture of the true status of these occupations which make the major contribution to both video and sound programming:

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* Working and Not Working in the Performing Arts: A Survey of Employment, Underemployment and Unemployment Among Performing Artists in 1980. Ruttenberg, Friedman, Kilgallon, Gutchess & Associates, Inc. December 31, 1981. (Funded by grants from the National Endowment for the Arts, the U.S. Department of Labor, and the Ford Foundation.)

> The jobs of performing artists tend to be more intermittent than those of other workers; their periods without work more numerous and long-lasting; and their pay well below that of other professionals. (p. 1).
>
> Income and Earnings
>
> Performers' individual earnings are also considerably lower than those of workers employed in similar occupations in the workforce. For male performers, earnings fell between $6,000 and $10,000 below the 1980 median earnings of male professional, technical, and kindred workers; for female performers, the comparable earning gap was between $1,000 and $5,000. (p. 9).
>
> Unemployment
>
> Performing artists are much more prone to unemployment than members of the civilian labor force as a whole. Just 18 percent of persons in the civilian labor force experienced some unemployment during 1980 -- well below the 76 percent of dancers, 67 percent of actors, 61 percent of singers, 35 percent of musicians, and 21 percent of performers in broadcasting occupations.
>
> * * * * *
>
> Their unemployment experience is severe both in terms of the number of spells of unemployment and the length of time they are out of work. While 15 percent of all unemployed workers in the labor force had three or more jobless spells in 1980, for unemployed performing artists the proportion was over one-third. .... (p. 5).

The Copyright Office in a report published in 1978 states that "... annual earnings of performers as a group are generally low, with almost a third of the musicians and two-fifths of the musical artists and radio and TV artists earning $7,000 a year or less."**

In conclusion, Mr. Chairman, I would like to urge action on the Mathias Amendment at the earliest possible time. Past experience clearly indicates that inaction in this situation will inevitably result in present practices becoming custom. Investments will be made based on the assumption that the custon will continue in total disregard of the copyright holders interest. Therefore, the longer legislative action is delayed the more difficult it will be to enact the fair resolution presented to you in the Mathias Amendment.

**Performance Rights in Sound Recordings, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, 95th Congress, Second Session, June 1978. Committee Print No. 15. p. 120.

AFFILIATES OF THE DEPARTMENT FOR PROFESSIONAL EMPLOYEES

Actors Equity Association
American Federation of Government Employees
American Federation of Musicians
American Federation of State, County and Municipal Employees
American Federation of Teachers
American Federation of Television and Radio Artists
American Guild of Musical Artists
Association of Theatrical Press Agents and Managers
Brotherhood of Railway and Airline Clerks
Communications Workers of America
Federation of Professional Athletes
Insurance Workers International Union
International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators
International Association of Machinists
International Brotherhood of Electrical Workers
International Federation of Professional and Technical Engineers
International Union of Electrical, Radio and Machine Workers
International Union of Operating Engineers
National Association of Broadcast Employees and Technicians
Office and Professional Employees International Union
Retail, Wholesale and Department Store Union
Screen Actors Guild
Seafarers International Union
Service Employees International Union
United Association of Journeymen Plumbers
United Automobile Workers
United Food and Commercial Workers

Senator **Mathias**. Let me first hasten to correct what might be an inadvertent misunderstanding. I said Mr. Petrillo was not always popular. I was going back in my mind to those days when he rang down the curtain on some popular shows of that period. But I think that with the passage of time, we have a better perspective on what he was doing, and it is that for which I think we congratulate him.

Mr. **Fuentealba**. Well, I can tell you, Senator, now that I have his job, I realize why he had to do what he did, because we are constantly trying to preserve jobs for musicians, and it is very difficult, particularly with all the technological developments that have taken place.

Senator **Mathias**. It is clear to us now that that is what he was doing when, as a relatively young man at that time, I was impatient that we were not getting the performances that we wanted, right then.

Mr. Golodner, I think you have been extremely helpful in defining for us what has been referred to throughout the morning as "intellectual property," as creative sounds and images. That is exactly what we are talking about. And it is a new thing, and that is one of the exciting things about this legislation, that we are dealing with new technolgies, we are dealing with the future, and perhaps that is one of the reasons that it is so difficult for people to grasp what is at stake here, that this is not the traditional area of patent and copyright which has dealt with very material things that you can see and measure and feel; this is a subjective area of property, and that is a relatively new concept in human understanding.

Mr. **Golodner**. If I might say, Mr. Chairman, you lead me to recall Abraham Lincoln's words, in which he said, "We must disenthrall ourselves with the past. The present provides new challenges, for which new ideas are needed."

We have heard earlier witnesses tell how the film industry, the recording industry, and others have always seen the bad side of the coin, and yet things turned out well. Well, the analogies are not correct. We have never before had the ability to transmit sound and images so easily and so clearly, and to copy them so easily and so clearly.

Senator **Mathias**. I think, as a Lincoln Republican, that is a good note on which to stop. The committee will stand in recess.

Mr. **Gortikov**. Thank you, Senator, for the attention of your staff, as well.

[Whereupon, at 1:17 p.m., the committee was adjourned.]

APPENDIX B

AFTER THE FIRST SALE:
THE COMMERCIAL RESALE AND RENTAL OF PHONORECORDS

Jonathan C. Sapirstein

I. INTRODUCTION[1]

Like many other items in our consumer society the price of record albums has been steadily increasing,[2] resulting not only from the higher cost to the manufacturer of raw materials, but increases in production expenses, advertising costs, songwriter and artist royalties.[3] By the time profit is worked in for the distributor and retailer, the consumer must pay dearly for a tape or phonorecord of contemporary music.

Perhaps as a backlash to the foregoing state of affairs a new subindustry has become increasingly pervasive: the commercial resale and/or rental of used records and tapes.[4] This paper will attempt to explore the implications of this phenomenon, analyze it in light of past and present copyright law, and suggest a possible reformulation of the present copyright provisions.

II. THE PROBLEM

The copyright owner is statutorily granted a bundle of rights, exclusive in scope, subject to a number of limitations.[5] Among these powers are the rightsto reproduce, adapt, distribute, publicly perform, and display.[6] The scope of exclusive rights in phonorecords, however, is somewhat more limited as performance and display rights have been specifically excluded.[7]

These rights and the evolution of certain qualifications are the outgrowth of a tug of war between competing forces.[8] One interest, of course, is the protection, in both economic and creative terms, of the author/creator.[9] Such a "monopoly" seeks to reward he who has created and perhaps to encourage others to follow suit.[10] It is the formal recognition of a society of the magnitude of the creator's contribution. More dramatically, it is indicative of society's formal commitment to pay substantially for creative works.[11] Conversely, undue control over the flow of creative works defeats one of the most basic purposes of copyright: public enrichment.[12]

Against the foregoing background the proliferation of commercial retail outlets selling or lending for a profit used phonorecords, presents a particularly paradoxical problem. The consumer who might otherwise have purchased a new record; thereby reimbursing the copyright holder for his or her huge investment, as well as compensating the relevant creative interests, is able to purchase a used one, often in near perfect condition, for less money.[13] Moreover, many such outlets are repurchasing these records with the objective of multiple resales.[14] This problem is compounded by the fact that many consumers are purchasing or borrowing these records with the express purpose of home taping.[15] It appears that such commercial activity is fully protected under the "first sale" provision of the copyright law.[16]

III. THE FIRST SALE DOCTRINE

A. The Origins of First Sale

The first sale doctrine grants to the owner of a lawfully manufactured and purchased phonorecord the right to sell or dispose of that phonorecord in any manner or fashion he or she so chooses without the authority of the copyright holder.[17] Two concepts are critical to an understanding of the scope of this limitation. First, a distinction must be made between the ownership of the copyright and the ownership of the material object.[18] The effect of the first sale of a particular phonorecord is to divest the copyright owner of an interest in the latter and not the former.[19] Second, the first sale of a particular phonorecord does not in any way affect the substance or scope of various other exclusive rights that vest in the copyright owner.[20] Accordingly, the fact that a consumer or record retailer validly owns a particular phonorecord does not mean that he or she may then make copies of that record for sale in the stream of commerce without permission of the copyright holder.[21]

Thus, the first sale doctrine acts as a limitation on the copyright holder's distribution right by granting owners of the material object unconditionalal powers of alienation.[22] This right, perhaps based on traditional property concepts which tend to discourage any restraints on alienation in the absence of a valid public policy, has its roots in the common law.[23] A few cases will serve to illustrate its application before subsequent incorporation into the copyright law.

In the case of Harrison v. Maynard, Merril & Co.,[24] the copyright holders of certain books contracted with a book binder for his services. After a fire appeared to have damaged a number of the books, they authorized the binder to sell the remains to a middleman, who subsequently sold them to various scrap dealers, under the agreement that the paper was to be used as stock only. Having observed copies of the work in defendant's used book store, the copyright holders brought suit to restrain the sales, arguing copyright infringement. The court denied relief holding that:

> [T]he right to restrain the sale of a particular copy of the book, by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes. The new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book; but, the copy having been absolutely sold to him, the ordinary incidents of ownership in personal property, among which is the right of alienation, attach to it.[25]

A similar result was reached in the leading case of Bobbs Merril v. Strauss.[26] In Bobbs Merrill the copyright holder of a book sold a number of copies to various wholesalers all bearing a legend on the flyleaf purporting to restrict future retail sales for less than one dollar. The notice stated that failure to comply would constitute copyright infringement. The defendant retail dealer was sued for infringement upon discovery of his noncompliance. The Supreme Court denied relief holding that copyright protection is limited only to the initial sale and is not applicable as a restriction on the purchaser with respect to any future sales.[27]

B. First Sale And The 1909 Copyright Act

The first sale doctrine was subsequently incorporated into the 1909 revision of the copyright law in section 27 which provided:

> The copyright is distinct from the property in the material object copyrighted, and the sale of conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assign-

> ment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained.[28]

The doctrine in its statutory form, however, was plagued by a wide variety of problems due most probably to the somewhat imprecise language. For example, the phrase "the possession of which has been lawfully obtained" is capable of a number of different interpretations. Taken literally, one could argue that the innocent purchaser of an illegally manufactured or copied record[29] would not infringe the owner's copyright upon resale, although the interpretive case law is overwhelmingly to the contrary.[30] Similarly, a mere bailee, by very definition in lawful possession, could argue protection upon unauthorized resale under a literal reading of section 27.[31]

Application of the foregoing construction would present a somewhat perplexing dilemma to the copyright holder who seeks to have copies of the protected work manufactured for eventual sale. By surrendering mere possession purely for the purpose of reproduction, the proprietor runs the risk of losing a portion of his copyright protection. The alternative is self manufacturing and reproduction, the economics of which might operate to foreclose many from the opportunity to vend their works.

This problem seems to have been first addressed by the 2nd Circuit Court of Appeals in Platt & Munk Co. v. Republic Graphics, Inc.[32] Platt & Munk involved a defendant manufacturer of copyrighted toys, alleged by the plaintiff holder to have been defective, who decided to sell them in satisfaction of the contract price. The court, per Judge Friendly, affirmed the lower court injunction restraining the manufacturer from selling the protected items, recognizing thereby the potential infringement of the exclusive right to vend. Citing the legislative history to the 1909 Act, he declared that the legislative intent required the presence of a first sale, before the holder is divested of the exclusive vending right as to the particular material object.[33] Consequently, a remedial "judicial gloss" has been applied to section 27 requiring a full transfer of title rather than mere valid possession before the first sale limitation is triggered.[34]

C. First Sale And The 1976 Copyright Act

The first sale doctrine in its current formulation is incorporated in sections 109[35] and 202[36] of the 1976 Copyright Act. Section 109(a) provides that: "...the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[37] Section 202 codifies the distinction between ownership of the copyright and ownership of the material object:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object. [38]

Section 109(c) operates to limit the foregoing by denying the privilege of resale to "...any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan or otherwise without acquiring ownership of it."[39]

Thus, section 109 of the current act addresses squarely the dilemma posed by the Platt & Munk controversy by extending protection only to the lawful owner rather than mere possessor. Missing, however, is any express requirement of an actual first sale.[40] Thus, is section 109 protection afforded to a licensee manufacturer who is the original owner of the material object? The House Report on this section, however, clearly sets forth the legislative intent that a full transfer of ownership occur before the section becomes operative. The House Report states that section 109(a)

> restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns a particular copy or phonorecord lawfully made under this title and who wishes to transfer it to someone else or to destroy it.
>
> Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. [41]

Section 109 may also be viewed as a clear legislative response to the innocent purchaser of an illegally made copy seeking refuge in the literal interpretation of section 27. Section 109 now requires not only lawful ownership of the material object, but that the object itself have been legally manufactured.[42] Although the same result might be achieved under the Platt & Munk approach as no first sale was duly authorized by the copyright holder, section 109 makes clear a legislative intent to deny such protection to any seller of pirated phonorecords.[43]

One particularly troublesome and frequently prevalent problem with respect to the application of section 109 and the first sale doctrine is that of burden of proof. The problem, arising most frequently in relation to criminal infringement cases,[44] is best illustrated by a civil infringement case: American International Pictures, Inc., et al. v. Foreman.[45] American International arose under section 27 of the 1909 Act and involved an action alleging infringement brought by the copyright owners of 120 films against a 16mm film distributor. The plaintiffs alleged that sales of their films by the defendant violated their exclusive right to vend, claiming that no first sale had ever occurred. At trial plaintiffs proved copyright ownership and presented testimony from film executives to the effect that the corporate policy was to tightly control the distribution of film prints. The defendant introduced evidence of an inconsistent course of conduct with respect to films owned by the plaintiffs but not the subject of the instant litigation. Neither party was able to prove the chain of title of the films in controversy. The district judge, in holding for the defendant, recognized a presumption that his possession was lawful; thereby determining that the plaintiffs had failed to carry the burden of proof on the issue of non occurrence of a first sale.

The decision, however was reversed on appeal. The court per Judge Godbold recognized first that the common law presumption of lawful possession is inappropriate with respect to copyright law. It was reasoned that since the copyright law favors the copyright holder, the mere possessor should assume the burden of proving valid title, the existence of which would bestow the unlimited distribution right. It was held,therefore, that mere possession was insufficient per se to meet this burden. It was held further that a mere possessor may only meet this burden by introducing evidence specific to the copies in question. Defendant's course of conduct evidence was therefore clearly insufficient

The question of who must show the occurrence or non occurrence of a first sale has been the subject of much debate. It is apparent that the House Committee was aware of the lower court decision in American International and specifically rejected it reasoning that such a presumption would place "...a virtually impossible burden on copyright owners."[46] There is however, considerable authority advocating a presumption in favor of defendants who claim as a defense the existence of a first sale.[47]

Under the current Act, however, it is quite clear that notwithstanding the existence of various common law property presumptions, the area of copyright law is sui generis. Although possession of property may ordinarily presume ownership, it is the defendant in a civil infringement action who must now not only show legal acquisition;[48] but legal manufacturing.[49]

IV. The Need For Reformulation

In general the law of copyright represents a most delicate balance between two frequently competing interests. Reduced to the very simplest form they may be characterized as the author/creator's moral and economic rights and the public's enjoyment rights.[50] Theoretically any reformulation of a particular copyright provision is justified if it would maximize both interests. Conversely, any reformulation which would advance one interest, perhaps to the detriment of the other, must withstand a somewhat stricter scrutiny to justify its adoption.

Against the foregoing background the case for reformulation of the first sale doctrine as it applies to the commercial resale or lending of phonorecords becomes particularly strong. Specifically, it is submitted that such activity be prohibited by amendment to the current copyright statute. Thus, a distinction should be recognized in the law as it currently exists, between commercial resale and private disposition barring commercial outlets from reselling or lending phonorecords, notwithstanding the existence of a valid first sale.[51]

It must be recognized from the outset that such a reformulation would in no way affect the disposition of phonorecords among and between private individuals (i.e. persons not in the business of selling). Aside from the obvious enforcement problem, such activity cannot reasonably be controlled within the spirit of the copyright law.[52]

The reason for such special treatment for phonorecords results primarily from technological advances in the music industry, the extent, scope, and effects of which could not reasonably have been foreseen when the first sale doctrine was first incorporated into the copyright statute near the turn of the century.[53] Indeed, the record industry itself during this doctrine's evolutionary stages was for all intents and purposes non-existent.

To understand how this doctrine operates as a specific injustice when applied to phonorecords, it is helpful to examine the cause and effects of a commercial resale. Consider the phonorecord for sale to the consumer at his or her local record store. Incorporated within the sales price are the manufacturer's costs of raw material, advertising, overhead, artist and producer royalties, and songwriter royalties. Consider also the fact that the expense of producing the album may run in excess of $[illegible]0,000,[54] the cost of which is initially assumed by the manufacturer.[55] Finally, the vast majority of records fail to recoup this vast initial investment.[56]

The first consumer sale, although not technically the first sale,[57] is the only means by which the copyright holder is able to secure a return on this enormous investment. Subsequent commercial transactions all involving the same phonorecord, potentially unlimited in number, unjustly result in a windfall to the reuser whose risk is comparatively quite minimal.[58] Curiously, those whose interest is the greatest, the copyright holder and the creative contributors, are deprived of any share of this potentially vast source of income.[59]

Add to this state of affairs the meteoric proliferation of home taping devices, coupled with the availability of inexpensive blank tapes, it becomes clear that the consumer faced with the option of purchasing a new record at a retail price level and a used one at about half that price or less, will quite frequently choose the latter, especially if he or she is able to sell the record back.[60] Thus, one phonorecord may be the source of an unlimited number of copies all being enjoyed by an endless number of owners, with reimbursement occurring but once.[61]

The effects are potentially staggering in both economic and creative terms; extending far beyond mere loss of sales to the manufacturer/holder. The songwriter and publisher who are entitled to mechanical royalties[62] for each copy sold are deprived of compensation on resale, notwithstanding the fact that a record with his or her song on it was indeed purchased by a new consumer whose sale might, but for the legality of commercial resale, have ordinarily resulted in financial enrichment.[63] Similarly, artists and producers often compensated for their efforts solely on a "numbers sold" basis are reimbursed in a manner disproportionate to the true results of their labors.

It is the manufacturer and copyright holder of the record, and ultimately the music listening public, however, who are perhaps most detrimentally affected by this occurrence. The manufacturer's huge investment has already been noted; the effects of loss of income due to commerical reuse are therefore obvious. But when one considers that the overall quantity of album projects are financially unsuccessful,[64] and that it is the winners, though small in quantity, which provide the return, and that it is the latter which are most frequently the subject of commercial reuse,[65] the repercussions are particularly devastating. Creatively, the new artist and ultimately the music listener suffer as the foregoing practice severely hampers the financial ability of manufacturers to take a chance on an unknown entity.[66]

The commercial reuse of other material objects such as books, although theoretically analogous, is in practical terms devoid of the aforementioned detriments.[67] Clearly no rational argument can be made that the proliferation of home book copying (e.g. on a photocopier) is nearly as extensive as that which is presently occurring in the music business. The economics of such activity, in the present at least, are clearly prohibitive.[68]

Given the foregoing justification, the question then arises as to the necessity of distinguishing between commercial resale and private disposition. Certainly unlimited and unrestrained private disposition of phonorecords causes the same adverse consequences as commercial resale. A number of factors, however, operate to justify this distinction. First and perhaps most obvious is the problem of enforcement. Although not in and of itself a justification, governmental monitoring coupled with criminal or civil sanctions for purely private transactions is not only unreasonable, but would constitute an undue governmental invasion of individual privacy.[69] Regulation of such activity is clearly infeasible

Second, and perhaps most important, is the fact that this distinction conforms with the very purpose of copyright law and is in fact evident in a number of other copyright provisions. Thus, if it can be said that the purpose of the copyright law is to "...grant valuable enforceable rights to authors, publishers, etc., without burdensome requirements..."[70] certainly compensation for the copyright holder is warranted when a commercial transaction occurs.[71] Conversely, although such compensation is theoretically justified from a private or non profit dispostion (under a pure compensation theory) it is hardly justified given the potential burden.[72]

This approach may be illustrated, for example, by the fair use doctrine[73] which incorporates this distinction. Fair use is a broad, statutorily recognized technique used to cut back on the copyright "monopoly" where public policy or pure common sense so require. The advancement of art or science, for example, may be sufficient justification for the use of exact words of a publication by those working in the field.[74] Similarly, use of a copyrighted article may be permitted without the authority of the holder where the purpose is parody.[75] Among the factors to be considered in determining whether use is "fair use" or copyright infringement is "whether such use is of a commercial nature or is for a non profit educational purpose.[76]

This distinction may also be found in section 110 which operates to limit the scope of the exclusive performance right in certain instances.[77] Specifically, section 110(4) may authorize performance of a copyrighted work without license or authority where the purpose is neither directly or indirectly commercial. Under this provision, for example, a person singing a copyrighted lyric, for personal gratification in a private setting, need not obtain a license, and therefore does not infringe the copyright holder's exclusive performance right.[78] When this same person, however, is placed upon a public stage, in a commercial setting, performance without a license may very well constitute infringement.[79]

Ultimately any proposed copyright reformulation must be evaluated not only in light of the expressed general purpose of copyright law, but the specific economic repercussions that might result. As noted earlier copyright problems may be analyzed in terms of a constant manifestation of tension between those who benefit from the "monopoly" and those who are restrained. Ideally any reformulation would advance both interests. Pragmatism, however, often requires one interest to be sacrificed for the benefit of the other.[80] Any proposal which would advance both interests without attendant detriment is sufficient justification per se for reformulation. On the other hand, the existence of some compelling reason may serve to justify a reformulation, the effects of which might very well cut back on a specific interest.

A question arises, therefore, whether there exists an interest the quality of which is sufficient to justify the maintenance of commercial reuse. True, the short term benefit to the purchaser/borrower is substantial, although not without certain drawbacks.[81] But can the public enjoyment interest be measured solely in terms of short term economic benefits? Specifically, if it can be argued that the primary public interest in copyright law is the advancement and encouragement of the arts, then the short term price reduction effect of commercial reuse is comparatively insignificant when measured against the inevitable consequence of fewer new artist investments.[82]

Similarly, there can be no doubt that the commercial reuser is able to derive a considerable profit from this practice and that incorporation of the proposed reformulation into the copyright law would deprive him or her of a lucrative form of business. It must be remembered, however, that the reuser's interest in profit is clearly subordinate to the interest the public retains in the advancement of the arts. Accordingly, it has been held that protection of the creative interests is an important means of achieving this objective.[83] Moreover, the stimulation of new record sales which would inevitably result from the incorporation of the proposed reformulation, would serve as at least partial compensation to the many who are in both businesses.[84]

V. COMMERCIAL REUSE AS UNFAIR COMPETITION

A. Misappropriation

The term "unfair competition" has been characterized as "any violation of a right arising from the operation of an established business".[85] Existing within this large category are a number of subcategories including "passing off" and misappropriation. "Passing off" may be characterized as commercial activity that exploits a competitior's goodwill by offering for sale merchandise falsely labeled as that of the competitor's.[86]

Somewhat related is the misappropriation doctrine, a device evolved from the common law, which enables a party with a particular "quasi property" interest, often obtained at great expense, to prohibit the commercial exploitation of that interest by others. Simply stated, it is the recognition of certain equitable rights that vest in the creator as a result of his or her efforts, the scope of which may operate to protect the unjust appropriation of the finished product.

The former appears inapplicable to the commercial reuse phenomenon as deception is not characteristic of the practice. Indeed, the cause of the injustice derives not from a deceptive or fraudulent practice, but from the ability, unique to the commercial reuser, to profit lucratively from the sale of phonorecords, at the expense of the copyright holder.

The misappropriation doctrine, however, appears quite applicable to the practice. Indeed, this device has been invoked on numerous occasions to protect interests in phonograph records; most notably as a means to restrain record piracy.[87] The origin of misappropriation may be traced back to the case of International News Service v. Associated Press,[88] which involved two news gathering organizations whose business it was to sell news stories to various subscribers. Plaintiff, Associated Press, employed for this purpose, a number of reporters around the world. These reporters would send certain fast breaking stories to an office in New York where they would be communicated to their subscribers and printed shortly thereafter. Defendant, International News, would then gather this information from the New York papers and immediately telegraph it to its west coast subscribers who were often able to receive it ahead of plaintiff's west coast subscribers.

The Supreme Court, per Mr. Justice Pitney, sustained the lower courts injunction prohibiting International News from utilizing the plaintiff's reports "until its commercial value as news to the complainant and all of its members has passed away."[89] To justify this decision the court recognized a "quasi property right" that vested in the plaintiff, as against any competitor, in the news dispatches notwithstanding the fact that they had been already published and not copyrighted. Obviously persuasive to the Court was the extent to which the defendant was able to capitalize on the plaintiff's efforts and expense:

> [D]efendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown... [90]

Some years later the misappropriation doctrine was utilized to protect a record manufacturer's interest in an exclusive recording contract with an artist. In Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation,[91] the defendant made unauthorized recordings from a radio broadcast which were then offered for sale to the general public. In granting relief on a misappropriation theory to both artistand manufacturer, the court went somewhat beyond that which was assumed to be a prerequisite for such relief: direct competition:

> The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial nature are to be and will be protected from any form of unfair invasion of infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted by the wrongdoer.[92]

It has been said that there are three basic elements necessary to constitute misappropriation:[93] First, the complaining party must have a time, money, or labor investment sufficient to qualify at least as a "quasi property right" in a particular creation.[94] Second, defendant must have unjustly capitalized on this investment such that he may be characterized as "reaping what has not been sown".[95] Finally, the complainant must estalish some sort of injury sufficient in scope to justify relief.[96]

Applying the foregoing elements to the commercial reuse phenomenon, it becomes apparent that the case is strong that such activity may constitute misappropriation. First, that the copyright holder of a phonorecord has expended time, labor, and money in so creating is evident. As noted earlier initial investments often run as high as $100,000.[97] It is submitted that even after a first sale, the effect of which might divest the holder of any interest in the material object, there nevertheless exists a "quasi property right", the interest in future sales, in need of equitable protection.[98] Accordingly, it has been held that a copyright holder's investment is in and of itself an interest sufficient to justify such protection vis a vis any competitor.[99]

Second, there can be no doubt that the commercial resale or lending of a phonorecord results in a comparative windfall to the reuser, given the fact that he is able to profit from the record at little or no cost and that such activity therefore constitutes an unfair advantage.[100] In this respect the reuser's ability to profit as an advantage is remarkably similar to the edge enjoyed by many pirates. Both the pirate and the commercial resuer are able to profit an infinite amount of times from a phonorecord, the compensation for which is paid but once. The pirate produces many copies from one that might be legally manufactured and profits from all future sales. Analogously, the commercial reuser sells or lends one copy an infinite amount of times and profits from all future sales. In both instances compensation to the copyright holder, and ultimately to the other creative interests which rely upon sales, occurs but once.

Consequently, the final element of injury becomes quite evident. In the International News case this was shown by a "direct diversion of profits from the plaintiff to the defendant."[101] It has been held, however, that direct competition is no longer essential as a prerequisite for misappropriation.[102] Thus, the fact that the commercial reuser is not in the business of creating phonorecords should not affect the applicability of the misappropriation doctrine. Thus, in the case of commercial reuse, profits or compensation which might ordinarily flow to the copyright holder are instead reaped by the owner of the material object. The injury, therefore, is similar to that which is perpetrated by the record pirate: diversion of profits.

B. The Problem Of Preemption

At the very threshold of such an analysis, however, exists the problem of preemption.[103] Certainly one of the major innovations of the 1976 copyright law is section 301 which sets forth a two part test for the determination of whether a state recognized right is nevertheless preempted under the federal copyright law.[104] The test requires not only that the state recognized rights be claimed through works which are within the "subject matter" of the federal copyright law,[105] but that the scope of such rights be "equivalent" to the exclusive rights under section 106.[106]

The first part of the test is generally applied without difficulty as the statute clearly sets forth the works to which federal copyright protection is afforded.[107] With respect to the practice of commercial reuse, the copyright holder would probably not fare too well arguing exemption under this provision as phonorecords are specifically recognized in the 1976 law.[108]

The application of the equivalency test, however, presents a far more complex problem. With respect to a cause of action under a misappropriation theory, the issue becomes whether the right to be enforced is "equivalent" to that which is protected under the federal law. Under a literal interpretation of this test it appears quite arguable that such an action would not be preempted by the federal statute. As the Copyright Act operates to protect the holder vis a vis the distribution right only to the extent of the first sale, there appears to be no reason why a state created right cannot be recognized at the point where the former ceases.[109] Mutual accomodation in this area would hardly contradict the constitutional requirement of federal supremacy as no true conflict would result.

Thus, it has been argued that a valid distinction exists between a holder's exclusive rights under the federal law, and certain equitable rights more circumscribed in scope, recognizable in a state cause of action.[110] The former may be characterized as a direct interest in the limited monopoly itself, derived from federal authority, and enforceable against any potential infringer. The latter, however, is the right of a business entity to operate in a fair commercial setting, the enforcement of which is far more limited. Such equitable rights operate to protect narrow but important interests and are recognizable against only those whose relationship is at least "quasi-competitive". Simply stated, remedies such as a cause of action for misappropriation are a manifestation of what has been historically regarded as a legitimate state interest; a fair and equitable commercial environment.

The foregoing approach was recently affirmed in a case concerning the California Resale Royalties Act[111] which requires certain dealers of fine art to pay a commission after the first sale to the original artist. In Morseburg v. Balyon,[112] plaintiff, art dealer, sought a declaration that the act was unconstitutional arguing that such legislation was preempted by the federal copyright law. The court, however, upheld the law noting that since the federally protected distribution right extends only to the first sale, a state created right in future resales does not create a conflict:

> Not only does the California law not significantly impair any federal interest, but it is the very type of innovative lawmaking that our federalist system is designed to encourage. The California legislature has evidently felt that a need exists to offer further encouragement to and economic protection of artists. That is a decision which the courts shall not lightly reverse. An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of a free and vital community of artists. The California Resale Royalties Act may be a small positive step in such a direction.[113]

Nevertheless, there exists authority that the Morsburg approach is erroneous and that such state created rights cannot survive in light of the preemption provision.[114] Accordingly, it has been argued that in determining "equivalency" for preemption purposes, there is no requirement that both rights be coextensive; the mere fact that Congress acted in the area being sufficient justification for such a judgment.

C. Commercial Reuse As An Unfair Trade Practice

Undoubtedly the genesis of the Federal Trade Commission Act resulted from an intent to expand somewhat upon what was perceived to be the potential evils of monopoly.[115] It seems somwhat anomalous, therefore, to invoke these provisions as a means by which to secure protection in favor of a copyright holder, who might be characterized as the grantee of a "limited monopoly".[116] Nevertheless, section 45(a)(1) of the Act declares unlawful "unfair methods of competition in commerce" and "unfair or deceptive acts".[117] Accordingly, it has been held that there exists no prerequisite that the achievement of a monopoly be proven before the act may be invoked.[118] There seems no reason therefore, at the very threshold at least, to conclude that such action in favor of the copyright holder against a commercial reuser is inappropriate.[119]

The initial question then must be addressed as to what is the definition of "unfair trade practices" under the Act and whether commercial reuse so qualifies. Although no precise definition of this phrase as it is used in the Act is presently recognized, a number of general guidelines have been offered.[120] In the case of Re Pfizer,[121] for example, the following considerations were set forth:

> 1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, common law, or otherwise, that is whether it is within at least the penumbra of some established concept of unfairness, 2) whether it

> is immoral, unethical, oppressive, or unscrupulous and 3) whether it causes substantial injury to consumers or competitiors; unfairness analysis will take into account many basic economic facts and considerations, and will permit broad focus in examination of marketing practices. 122

Under the foregoing guidelines the case for invocation against the commercial reuser is indeed arguable. Such activity, for example, easily falls within the "penumbra" test of the first consideration as at least a prima facie case of misappropriation may be made out.[123] Similarly, commercial reuse is clearly oppressive given the fact that, as in piracy, the potential exists whereby an infinite amount of copies may be made and enjoyed with compensation to the holder and the creative interests occurring but once. Such activity has the effect of stifling those whose investment and risk are the greatest; while simultaneously providing a virtual risk free windfall to the commercial reuser. The third requirement of injury, therefore, is readily apparent to competitiors and consumers alike. Thus, the copyright holder, although perhaps not in direct competition with the reuser, as no phonorecord is actually being manufactured, is nonetheless injured by the resulting loss of sales.[124] The consumer is injured in the long term by the inevitable effect the dimunition of return has on the manufacturers of phonorecords: the inability or increasing unwillingness to take a chance on investing in a new artist.

Equally important, for the purposes of the Federal Trade Commission Act, is the possibility that this practice might very well constitute an "unfair method of competition", given the anti-competitive effect commercial reuse has on the entire record industry. If one accepts the premise that the optimum state of affairs in the industry is the maximum amount of investment in record projects by as many different investors as possible, then it becomes clear that the reuse phenomenon has a deleterious effect on the creative and competitive environment of the entire phonorecord business. Specifically, this sanctioned erosion of compensation discourages further those who are already somewhat reticent about investing in a creation which rarely turns a profit.[125] This situation inevitably forecloses the ability of the small investor to participate in the medium, as he or she is least able to withstand the aforementioned risk.

The consequence of the foregoing is the eventual domination of the industry by a handful of supercorporations. While perhaps not yet constituting an antitrust violation, the situation may be ripe nonetheless for an FTC action, one of the purposes of which is to "combat in their incipiency trade practices that exhibit a strong potential for stifling competition."[126]

Finally, relief to the copyright holder under the Federal Trade Commission Act is in no way precluded by the preemption provision of the current copyright law. Section 301(d) specifically provides that "nothing in this title annuls or limits any rights or remedies under any other federal statute." Accordingly, if such a remedy should be deemed warranted, it could not be argued that it is superseded by the copyright statute.

CONCLUSION

The proliferation of commercial retail outlets selling or lending used phonorecords presents a serious problem to the record industry. This practice results in a virtual windfall to the "reuser" enabling him or her to profit from a phonorecord an unlimited amount of times, while reimbursement to the copyright holder and ultimately to the other contributing interests occurs but once.

This state of affairs is currently sanctioned under the first sale doctrine of the copyright law which grants to the owner of a legally manufactured material object virtually unlimited powers of alienation. Consequently, a reformulation of this provision is proposed which would distinguish between commercial and private disposition; the effect of which would be to prohibit the practice of commerical reuse. The private or non-profit disposition of phonorecords, however, would not be affected.

A number of justifications have been offered in support of this proposal. Economically, it is the copyright holder whose risk is the greatest given the enormous investment record production requires. Similarly, the other creative contributors, generally compensated on a "numbers sold" basis, retain an important interest in the future sales of the product. It is submitted that the foregoing interests should be given preference over the short term interest of the commercial reuser.

Additionally, a distinction between commercial and non-commercial disposition is consistent with the purpose of the copyright law and is in fact evident in a number of provisions, including for example, fair use and limitations of the exclusive performance right. Incorporation of this distinction into the first sale doctrine as it applies to phonorecords is warranted given the fact that the current state of technology makes this medium especially vulnerable to the various side effects of unrestrained disposition.

Moreover, there exists at least a prima facie case that the practice of commercial reuse constitutes unfair competition in the form of misappropriation. Thus, the fact that the copyright holder has made a considerable time, money, and labor investment in the phonorecord, and retains a "quasi property right" therein in the form of an interest in future sales, makes such equitable relief appropriate, given the irreparable injury commercial reuse invariably causes.

The misappropriation doctrine has in the past been widely applied in favor of phonorecord copyright holders, most notably as a means by which to restrain record piracy. The justification for such restraint, especially in economic terms, is equally applicable to commercial reuse. Record piracy involves the unauthorized copying of a phonorecord; the end result being numerous copies created and sold with compensation to the holder occurring only with the original. Analogously, commercial reuse involves multiple sales and rentals resulting often in unrestrained duplication in the form of home taping, with compensation occurring but once. The injury in both practices is identical: endless amounts of copies created and enjoyed, the compensation for which is retained by the record pirate and commercial reuser The beneficiaries in both instances are those whose investment is comparatively minimal, and whose justification for such gain, therefore, is clearly the least of all the interested parties.

Although it is indeed arguable that the preemption provision of the 1976 copyright law operates to foreclose a state recognized cause of action based on misappropriation, there is considerable authority to the contrary. Specifically, with respect to the practice of commercial reuse it may be argued that as the federal law protects the holder only to the extent of the first sale, a state recognized interest in excess of that protection would not violate the requirement of federal supremacy as no conflict would arise. Indeed, this very approach was adopted by a federal court in upholding the California Resale Royalties Act which recognizes on behalf of the creator of fine art an interest in future sales in excess of that which is provided by the federal copyright law.

Finally, there exists the possibility that relief to the copyright holder might very well be available under the Federal Trade Commission Act which makes unlawful "unfair trade practices" and "unfair methods of competition". Such activity is not only unfair and oppressive to the copyright holder, but produces a substantial injury in the form of an inevitable dimunition of sales. Moreover, the practice of commercial reuse has a distinct anti-competitive effect caused by the discouragement of potential investors who lack vast financial resources. The unfortunate consequence is a large creative industry dominated by a small amount of super corporations. Such relief is not foreclosed by the copyright law which specifically permits the assertion of rights and remedies recognized in collateral federal statutues.

FOOTNOTES

1- This paper was inspired in part by two articles appearing in the February 28 1981 edition of Billboard, a record industry trade magazine. The first, entitled "U.K. Court Throws out B.P.I. Record Rental Case", involved a British record retailer and seller of blank tapes who endeavored to expand his business by opening up a record library. The British Phonographic Industry [B.P.I.] brought suit alleging that the retailer was authorizing illegal home taping and infringing copyrights. The court denied relief reasoning that such a practice goes no further than authorizing the borrower to play the record.

The second article [hereinafter referred to as Billboard article II], entitled "Retailer to Franchise Rent a Disk Scheme", involved a Toronto retailer's attempts to franchise America's first "rent a record" chain. An outlet already underway was renting out records for the price of $2.50 with business described as "booming beyond belief". The retailer claimed to have logged each transaction, setting aside 15 cents therefrom for the purpose of making voluntary payments to the appropriate mechanical rights organization. It was noted that one John Lennon record, retailing ordinarily for $6.98, was the subject of numerous rentals and subsequently one sale as a used record, bringing in a total of $36.

A third article, published after work on this paper commenced, appeared in the August 1, 1981 edition of Record World and was entitled "Used Records Boosting Profits for Many Retailers." It was reported therein that based on an informal survey, a small outlet was able to move as many as five hundred used records per day. It was found that the stores' investment was between 50 cents and $1 for records that were being sold for up to $4, and that business was "excellent".

2. The present retail list price for a phonorecord is $8.98. See Billboard Magazine, August 1, 1981, at 71.

3. Mechanical royalties, for example, were increased from 2 cents to 2.75 cents by the 1976 copyright law. 17 U.S.C. § 115(c)(2)(Supp.III 1979).

4. Hereinafter called commercial reuse.

5. 17 U.S.C. § 106 (Supp.III 1979).

6. Id.

7. 17 U.S.C. § 114 (Supp. III 1979).

8. "Civil copyright law is a compromise between competing social policies-one favoring the widest possible dissemination of new ideas and new forms of expression, and the other giving writers and artists enough of a monopoly over their works to ensure their receipt of fair material rewards for their efforts." U.S. v. Bily, 406 F. Supp 726, 730 (E.D. Pa. 1975).

9. "The two major purposes of the Act are (1) to secure to the author, or his successors in interest, a monopoly, more or less in the nature of a reward for his genius and industry, as well as for the encouragement of others,... (2) to give notice to the public that the author or other owner has not abandoned the child of his intellect..." Pearson v. Washingtonian Pub. Co. 98 F. 2d 245, 248 (D.C. Cir.1938), rev'd on other grounds, 306 U.S. 30 (1939). See also Scott v. WKJG Inc., 376 F.2d 467 (7th Cir. 1967), cert denied 389 U.S. 832 (1968); Jondora Music Publishing Co. v. Melody Recordings, Inc., 506 F.2d 392 (3d Cir. 1974, as amended 1975), cert denied, 421 U.S. 1012 (1975); Lerner v. Schectman 228 F.Supp. 354 (N.D. Minn. 1964). This interest, while certainly a justification for copyright protection,

has not always been regarded as the most compelling one. See e.g. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (basic purpose of copyright is the stimulation of artistic creativity for the general public good).

10- See e.g. Pearson v. Washingtonian Pub. Co., 98 F.2d.245 (D.C. Cir. 1938), rev'd on other grounds, 306 U.S. 30 (1939).

11- Accordingly, the Supreme Court has held that the economic rationale behind the copyright grant "...is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'", Mazer v. Stein, 347 U.S. 201, 219 (1954).

12- See, e.g., Twentieth Century Music v. Aiken, 402 U.S. 151, 156 (1975), (Although the immediate effect of the copyright law is creative compensation, the ultimate objective is public enrichment).

13- An analogous problem was considered in the case of Elektra Co. v. Gem Electronic Distributors, 360 F. Supp. 821 (E.D.N.Y. 1973). Elektra involved a number of record stores operated by the defendants in which they sold records copyrighted by the plaintiffs and others, blank tapes, and a coin operated machine called "make a tape" which was capable of duplication. The defendants' activities included loaning the copyrighted works to customers who then operated the "make a tape" machines themselves.

Defendants argued that their activities were essentially "home taping" given the self service characteristics of the operation. It was argued further that the practice was analogous to the existence of photocopy machines in public libraries , and as such could not constitute infringement. The court, nevertheless, issued an injunction restraining the defendants from continuing this practice. It was noted therein that the operation " ...clearly evidences their commerical exploitation ... for profit in derogation of plaintiff's rights of exclusive publication." 360 F. Supp at 823.

14. In the Record World article, supra note 1, e.g., records were repurchased by the retailer for between 50 cents and $1.

15. *See, e.g.*, Elektra Co. v. Gem Electronic Distributors, 360 F. Supp 821 (E.D.N.Y. 1973).

16. 17 U.S.C. §§ 109, 202 (Supp. III 1979). See notes 17-23 *infra* and accompanying test for an explanation of this doctrine.

17. U.S. v. Wise, 550 F.2d 1180 (9th Cir. 1977), *cert. denied*, 434 U.S. 929 (1978); U.S. v. Moore, 604 F.2d 1228 (9th Cir. 1979); Burke & Van Heusen Inc. v. Arrow Drug Inc., 233 F. Supp. 881 (E.D. Pa. 1964); Blazon Inc. v. Deluxe Game Corp., 268 F. Supp 416 (S.D.N.Y 1965).

18. 17 U.S.C § 202 (Supp. III 1979). *See also*,National Geographic Society v. Classified Geographi, 27 F. Supp 655 (D. Mass 1939); Remick Music Corp v. Interstate Hotel Corp. Of Nebraska, 58 F. Supp. 523 (D.Neb. 1944), *affirmed* 157 F.2d 744 (8th Cir. 1947), *cert.denied*, 329 U.S. 809 (1947); Hughes Tool v. Fawcett Publications Inc., 315 A.2d 577 [illegible]74).

19. 17 U.S.C. § 202 (Supp III 1979).

20. *See, e.g.*, Chappell & Co. Inc. v. Middletown Farmer's Market & Auction Co., 334 F.2d 303 (3rd Cir. 1964)(performance right not affected by disposition); Ginn & Co. v. Apollo Publishing Co., 215 F. 772 (E.D.Pa. 1914) (right to copy not affected); National Geographic Society v. Classified Geographic Inc., 27 F. Supp. 655 (D. Mass 1939) (right to adapt not affected).

21. Indeed, this would constitute record piracy.

22. Bobbs Merril Co. v. Straus, 210 U.S. 339

23. *See* R.C.A. Manufacturing Co., Inc. v. Whiteman, 114 F.2d 86 (2d Cir.) *cert. denied*, 311 U.S. 712 (1940); Murray v. Green, 64 Cal. 363, 28 P. 118 (1884).

24. 61 F. 689 (2d Cir. 1894).

25. 61 F. at 691.

26. 210 U.S. 339 (1908).

27. See also, Independent News Co. v. Williams, 293 F.2d 510 (3rd Cir. 1961); Fawcett Publications Inc. v. Elliot Publications Inc. 46 F. Supp. 717 (S.D.N.Y. 1942).

28. 17 U.S.C. § 27 (1976)(repealed 1976).

29. Hereinafter referred to as pirated record.

30. See, e.g., F.W. Woolworth v, Contemporary Arts Inc., 344 U.S. 228 (1952); Shapiro, Bernstein, & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957), cert denied, 355 U.S. 952 (1958); Platt & Munk Co. Inc. v. Republic Graphics, Inc. 315 F2d 847 (2d Cir. 1963).

31. See U.S. v. Wells 176 F. Supp 630 (S.D. Tex. 1959).

32. 315 F.2d 847 (2d Cir. 1963).

33. The 1909 House Report stated that

> Section [27] is not intended to change in any way existing law, but simply to recognize the distinction, long established, between the material object and the right to produce copies thereof. The concluding clause in the section, that "nothing in this act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a work copyrighted under this act the possession of which has been lawfully obtained," is inserted in order to make it clear that there is no intention to enlarge in any way the construction to be given to the word "vend" in the first section of the bill. Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale.

H.R. REP. No. 2222, 60th Cong., 2d Sess. 19 (1909).

34. See, e.g., Platt & Munk Inc. v. Republic Graphics Inc, 315 F.2d 847 (2d Cir. 1963); U.S. v. Wise, 550 F. 2d 1180 (9th Cir. 1977), cert. denied, 434 U.S. 929 (1978); American International Pictures Inc. v. Foreman, 576 F.2d 661 (5th Cir. 1978); Lantern Press Inc. v. American Publishing Co., 419 F. Supp. 1267 (E.D.N.Y. 1978); Yachting Publishing Corp. v. Friedman, 15 Misc. 2d 810, 182 N.Y.S. 2d 664 (1958).

35. 17 U.S.C. § 109 (Supp. III 1979).

36. Id. § 202.

37. Id. § 109(a).

38. *Id.* § 202.

39. *Id.* § 109(c).

40. M. NIMMER, COPYRIGHT § 8.12[B] (1978).

41. H.R. REP. No. 1476, 94th Cong., 2d Sess, 79 *reprinted in* [1976] U.S. CODE CONG & AD NEWS 5659, 5693. [Hereinafter referred to as House Report].

42. The House Report states that in order for § 109(a) to become applicable:

> a copy or phonorecord must have been "lawfully made under this title," though not necessarily with the copyright owner's authorization. For example, any resale of an illegally "pirated" phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not.

Id.

43. *Id.*

44. *See, e.g.*, U.S. v. Wise, 550 F.2d 1180 (9th Cir. 1977), *cert denied*, 434 U.S. 929 (1978); U.S. v. Atherton, 561 F.2d 747 (9th Cir. 1977); U.S. v. Moore, 604 F.2d 1228 (9th Cir. 1979); U.S. v. Whetzel, 200 U.S.P.Q. 193 (D.C. Cir. 1978).

45. 400 F. Supp. 928 (S.D. Ala. 1975), *rev'd* 576 F.2d 661 (5th Cir. 1978).

46. House Report, *supra* note 41, at 80, *reprinted in* [1976] U.S. CODE CONG & AD NEWS 5659 at 5693.

47. NIMMER, *supra* note 40, §12.11[E].

48. In criminal cases, however, consistent with due process requirements, the government assumes the burden of negating the occurrence of a first sale. *See, e.g.*, U.S. v. Wise, 550 F. 2d 1180 (9th Cir.1977), *cert denied*, 434 U.S. 929 (1978); U.S. v. Drebin, 557 F.2d 1316 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); U.S. v. Atherton, 561 F.2d 747 (9th Cir. 1977); American International Pictures v. Foreman, 576 F.2d 661 (5th Cir. 1978); U.S. v. Bily, 406 F. Supp. 726 (E.D. Pa. 1975); U.S. v. Wells, 176 F. Supp 630 (S.D. Tex. 1959).

49. The House Report stated that "...in an action to determine whether

a defendant is entitled to the privilege established by section 109(a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant."

House Report, supra note 41, at 81, *reprinted* in [1976] U.S. CODE CONG & AD NEWS 5659, at 5695.

50. *See* note 8 *supra*.

51. An alternative proposal would permit the practice of commercial reuse to continue but would levy a royalty upon the reuser, payable to the copyright holder, arising out of every such transaction. Although this formulation would certainly eradicate the compensation loophole unrestrained disposition creates, a number of practical problems operate to make it infeasible. The primary barrier to such a system is enforcement. It is simply unreasonable to think that the practice is capable of accurate monitoring, given the fact that hundreds of thousands of transactions could be involved with respect to many popular records. Even if an accurate system could be devised, the bureaucracy and paperwork that would inevitably result probably would not justify its existence.

Obviously distinguishable is the California Resale Royalties Act, CAL. CIV CODE §986 (West), which levies a resale royalty, payable to the artist, upon works of fine art. Although the justification for this legislation is analogous to that upon which this paper is based, the resale royalty is an efficient means of accomplishment as only one unit is involved, rather than hundreds of thousands.

52. In Goldstein v. California, 412 U.S. 546 (1975), the Supreme Court, referring specifically to the commercial/non-commercial distinction, declared that as a means by which people may be encouraged "...to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the *sale or commercial use* of copies of their works." 412 U.S. at 555 [emphasis added]. This has in the past, perhaps erroneously, been interpreted

as a limitation on Congressional power. See NIMMER, supra note 40, §103[B] n.7.

53. The first sale doctrine in its evolutionary stages was almost exclusively applied to books. See. e.g.,Bobbs Merril Co. v. Strauss, 210 U.S. 339 (1908); Harrison v. Maynard Merril & Co., 61 F. 689 (2d Cir. 1894); Doan v. American Book Co, 105 F. 772 (7th Cir. 1901); Bureau of National Literature v. Sells, 211 F. 379 (W.D. Wash. 1914). Only recently has it been applied to records "We entertain no doubt that the doctrine is applicable.", U.S. v. Moore, 604 F.2d 1228, 1232 n.3 (9th Cir. 1979). See also U.S. v. Whetzel 589 F.2d 707 (D.C. Cir. 1978).

54. See S. SHEMEL & W. KRASILOVSKY, THIS BUSINESS OF MUSIC 10 (4th ed. 1979). [Hereinafter cited as SHEMEL & KRASILOVSKY].

55. In most record contracts the manufacturer is able to recoup this investment before paying out additional royalties to the recording artist. Id..

56. It has been estimated that in excess of 70% of those records released fail to recover production costs. Brown, The Motown Sound of Money, FORTUNE MAGAZINE, Sept. 1 1967, at 102.

57. Generally the consumer sale is the second sale as most manufacturers sell the record first to distributors. See SHEMEL & KRASILOVSKY, supra note 54, at xxvi.

58. The reuser's "investment" in each phonorecord is often less than $1. See note 1, supra.

59. Cf. CAL. CIV CODE §986 (West) (State legislation which grants a resale royalty to the creator of certain works of fine art).

60. See note 1, supra.

61. In this respect, the practice of commercial reuse is analogous to record piracy.

62. 17 U.S.C. § 115(c)(2)(Supp. III)(providing a royalty of 2.75 cents or 1/2 cent per minute, whichever is greater, to the copyright owner of each song included on a record album).

63. It is interesting to note that in Billboard article II, note 1 *supra*, the retailer, sensing perhaps a moral and/or economic responsibility, logged each transaction and voluntarily made payments to the appropriate mechanical rights organization. The foregoing, however, falls far short of a truly equitable and comprehensive means of compensation. Mechanical royalties compensate only the publisher and songwriter. Conspicuously absent from such a renumeration procedure are the artist, the record producer, and perhaps most importantly (given the size of the investment) the phonorecord's copyright holder.

64. *See* note 39, *supra*.

65. This aspect of commercial reuse is strikingly similar to record piracy in that the pirate naturally duplicates only the top selling records thereby avoiding the risk factor of record investment. *See* *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess, ser. 7, 47 (1971).

66. The wide variety of music available to the consumer is a direct result of many record companies willingness to release "money losing records" such as some jazz and classical recordings. These releases are in effect subsidized by the return on the financially successful records. Any dimunition of return would therefore affect their willingness and/or ability to continue this practice. *See* Mercury Record Productions Inc. v. Economic Consultants Inc., 64 Wis.2d 163, 167, 218 N.W. 2d 705, 708 (1974), *appeal dismissed and cert. denied* 420 U.S. 914 (1975).

67. *Cf*. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970)(arguing that the economics of the book publishing industry are perhaps insufficient to justify copyright protection).

68. Perhaps if home photocopying devices were as widespread as tape recorders, such a reformulation would be justified vis a vis books.

69. In order for an accounting to occur with any semblance of ac-

curacy, each and every private transaction would have to be monitored.

70. Mazer v. Stein 347 U.S. 201, 219 (1954).

71. Indeed the Supreme Court has implied that this might be the only point at which compensation for the copyright holder is justified. *See* note 52, *supra*.

72. Under a "pure compensation" theory one might view reward as the *only* objective of copyright protection. While, as might be expected, many artists subscribe to this view, reward is often considered a secondary objective, and at best considered a "primary" purpose. *See* cases in note 9 *supra*.

73. 17 U.S.C. §107 (Supp. III 1979).

74. Henry Holt & Co., Inc. v. Liggett & Myers Tobacco Co. 23 F. Supp. 302 (E.D. Pa. 1938).

75. *See, e.g.*, Walt Disney Productions v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975).

76. 17 U.S.C. § 107(1) (SUPP. III 1979).

77. Id. §110.

78. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

79. *See, e.g.*, Irving Berlin Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929); Lerner v. Schectman, 228 F.Supp, 354 (D.C.Minn 1964).

80. The fair use doctrine,e.g., sacrifices the holder's interest for the general benefit of society.

81. One drawback to the purchase of a used record is the absence of a manufacturer's warranty. Generally, it is customary in the industry to either refund the purchase price or make an exchange in the event a record purchased new is defective.

82. An industry spokesman has testified that a record company's inability to extract a return from every transaction might directly affect the

ability to invest in new artists. Mercury Record Productions Inc. v. Economic Consultants Inc., 64 Wis, 2d 163, 167, 218 N.W.2d 705, 708 (1974).

83. "The economic philosophy behind the power of Congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare in that field." Bell v. Pro Arts Inc., 366 F.Supp. 474 (N.D.Ohio 1973), affirmed 511 F.2d (6th Cir. 1975), cert, denied 423 U.S. 829 (1975).

84. Many reusers sell new records as well.

85. House of Westmore Inc., v. Denney, 151 F.2d 261, 265 (3rd Cir. 1945).

86. See e.g., Singer Manufacturing Co. v. June Manufacturing Co, 163 U.S. 169 (1896). This practice has also been referred to as "palming off".

87. See e.g., Capitol Records, Inc. v. Erickson, 2 Cal.App.3d 526, 82 Cal Rptr. 798 (1969), cert. denied 398 U.S. 960 (1970); Capitol Records v. Spies 130 Ill. App.2d 429, 264 N.E.2d 874 (1970); National Broadcasting Co., Inc. v. Nance, 506 S.W.2d (Mo.Ct. of App., 1974); Capitol Records Inc. v. Greatest Records Inc., 43 Misc.2d 878, 252 N.Y.S.2d 553 (1964); Liberty/U.A. Inc. v. Eastern Tape Corporation, 11 N.C.App. 20, 180 S.E.2d 414 (1971), cert denied 278 N.C. 702, 181 S.E.2d (1971); Columbia Broadcasting System Inc. v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305, cert. denied 409 U.S. 1007 (1972); Mercury Records Productions Inc., 64 Wis 2d 163, 218 N.W.2d 705 (1974), appeal dismissed and cert. denied 420 U.S. 914 (1975).

88. 248 U.S. 215 (1918).

89. 248 U.S. at 245

90. 248 U.S. at 239,240.

91. 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950).

92. 199 Misc. at 796, 101 N.Y.S.2d at 492.

93. T. McCarthy, TRADEMARKS & UNFAIR COMPETITION §10.25 (1977).

94. Id.

95. Id.

96. Id.

97. See note 54 supra.

98. "To refuse to the groups who spend time, effort, money and great skill in reproducing these artistic performances the protection of giving them a property right in the resulting artistic creation would be contrary to existing law, inequitable and repugnant to the public interest." Metropolitan Opera Association v. Wagner-Nichols Recorder Corporation, 199 Misc. 786, 789, 101 N.Y.S.2d 483, 497 (Sup. Ct 1950). See also Mercury Records Productions Inc. v. Economic Consultants Inc., 64 Wis.2d 163, 172, 218 N.W. 2d 705, 714 (1974), appeal dismissed and cert. denied 420 U.S. 914 (1975)(recognizing a property interest in record manufacturer's investment of time, skill, and money).

99. Mercury Record Productions Inc. v. Economic Consultants Inc., 64 Wis2d 163, 218 N.W.2d 705 (1974), appeal dismissed and cert. denied 420 U.S. 914 (1975).

100. Note that in Billboard article II, note 1 supra, the reuser was able to take in $36 on a record with a retail list price of $6.98.

101. T. McCarthy, TRADEMARKS & UNFAIR COMPETITION §10.25 (1977).

102. See note 92 supra.

103. Although the argument certainly exists that this entire area of law has been preempted by the 1976 Copyright Act, such a determination is far from conclusive. Nevertheless, this section is intended as additional equitable or moral justification for the proposed reformulation. Moreover, the Act's preemption provision specifically exempts phonorecords manufactured before February 15, 1972. See 17 U.S.C. 6 301(c) (Supp. III 1979).

104. 17 U.S.C. § 301 (Supp. III 1979).

105. Id. § 301(b)(1).

106. Id. § 301(b)(3).

107. See id. § 102.

108. Phonorecords are specifically recognized by the statute. See id. § 102(7).

109. It has been argued, however, that in determining whether state recognized rights are "equivalent" to federal rights for preemption purposes, there is no requirement that they be "co-extensive". The fact that the state interest is broader or narrower does not automatically preclude "equivalency". See Nimmer § 8.22[B].

110. See Comment, The Misappropriation Doctrine After the Copyright Revision Act of 1976, 81 DICK. L. REV. 469, 491 (1977).

111. CAL. CIV CODE §986 (West).

112. 201 U.S.P.Q 518 (1978), affirmed 621 F.2d 972 (9th Cir. 1980).

113. 201 U.S.P.Q. at 520.

114. See note 109 supra.

115. F.T.C. v. Brown Shoe Co., 384 U.S. 316 (1966).

116. In F.T.C. v. Orient Music Roll 2 F.T.C. 176(1919), however, a F.T.C. action was utilized to protect a manufacturer's interestin the production of perforated music rolls, the creation of which required asizeable time, money, and skill investment in an original. The defendant was able to avoid the foregoing expenses by duplicating from legitimate copies. These duplicateswere then sold in competition with those produced by the manufacturer ata substantially lower price. The F.T.C. issued a cease and desist order ruling that the conduct constituted an unfair method of competition.

117. 15 U.S.C. § 45(a)(1) (1976).

118. Hastings v. F.T.C. 153 F.2d 253 (6th Cir. 1946), cert. denied 328 U.S. 853 (1946).

119. Accordingly it has been held that the phrase "unfair methods of competition" has a broader meaning than the common law phrase "unfair competition". A.L.A. Schecter Poultry Corp. v. U.S., 295 U.S. 495,532 (1935).

120. The Supreme Court has noted the need for this provision to be construed flexibly. See F.T.C. v. Colgate Palmolive, 380 U.S. 374, 385 (1965). Accordingly, the scope of this provision is to be determined on a "case by case" basis " Pan American World Airways v. U.S., 371 U.S. 296, 308 (1963).

121. 81 F.T.C. 23 (1872).

122. 81 F.T.C. at 61.

123. See text accompanying notes 97-102 supra.

124. Thus, the copyright holder is in competition with the commercial reuser at the retail level as both parties are interested in the consumer sale.

125. See note 56 supra.

126. F.T.C. v. Texaco Inc., 393 U.S. 223, 225 (1968).

127. 17 U.S.C. § 301(d) (Supp. III 1979).

STATEMENT OF
ALAN STRACHAN

Mr. Chairman and Members of the Subcommittee, my name is Alan Strachan. I am President of CODART, Inc. of Santa Rosa, California. We welcome this opportunity to submit a statement for the record as you consider S. 1758 and Amendment 1333.

We have requested this opportunity in order to tell the Committee that it is currently possible to address, through technology, the very copyright protection issues you are considering addressing through legislation. As such technological systems spread, the Congress may well be able to achieve its copyright protection goals by deferring to the marketplace rather than by creating a rigid legislative solution that will immediately and continuously be undermined by technological development.

The technology exists today, and will continue to be developed, that makes it possible for all interests in this dispute to be well served: for copyright owners to be fairly reimbursed for their work; for hardware manufacturers to sell their products and to earn revenues from the use of those products; and for the consumer to benefit through an efficient, inexpensive and just marketplace mechanism.

CODART is a system that permits consumers to record high fidelity materials directly from their televisions and radios, while guaranteeing copyright protection and royalty payment. It is an efficient, workable and cost-effective system that addresses multiple goals: software (program) suppliers receive a greater percentage of the retail sale of each item since marketing and distribution mark-ups are virtually eliminated; copyright is guaranteed; the manufacturer of the recorder receives a percentage of each sale made on his machine; the broadcaster receives a percentage of each recording made via his broadcast frequency; and the consumer gets a high quality recording more efficiently and less expensively than through any other mechanism.

CODART is, simply put, a sophisticated on/off switch that responds to tone codes it "hears" in analog or digital radio or television broadcasts or cable transmissions. When a CODART units hears a code for which it is programmed, it automatically turns on a video or audio tape recorder, turning it off in response to the appropriate "off" code.

A CODART user selects from a monthly catalogue those materials he wishes to record and calls a CODART-operated "800" number to receive a program code specific both to his machine and to the materials ordered. With the code entered into the CODART-equipped recorder, the home machine automatically starts and stops, recording the pre-selected materials.

Users are billed on a monthly basis for the codes they have requested. CODART's central accounting system then passes appropriate revenue shares directly to program copyright holders, program packagers, broadcasters, recorder manufacturers and others involved, completing this efficient pay-per-use cycle. It is a 21st century distribution system that replaces the highways with the airwaves.

What this system means in the context of S. 1758 and Amendment 1333 is that there is a system available that provides for the coincidence of interests among recorder manufacturers, producers of software and consumers. CODART makes it possible for technology and the marketplace to solve a problem that might otherwise only be imprecisely addressed through legislation and regulation. CODART and technology can already make it possible for the arguments of both sides in this dispute to be met: Technology can remove the cloud of illegality from home recording while it simultaneously respects the right of creative artists to own and license their works, and while it promotes the sale and use of recording technology.

The Congress should be cautious about developing legislative or regulatory solutions where those solutions might not be effective problem solvers. Although some of the short-term solutions proposed appear to have positive aspects, they may be building to long-term disaster for the consumer. It appears that quality programming migrates toward whichever medium offers a high per-head return, and away from any media that do not. On the other hand, across-the-board taxes inevitably increase consumers' end costs, and may increase the incentive for circumventing the legal distribution mechanisms.

The bottom line is that any solution to the problem must work in the marketplace or it will be subverted by whichever interests are ill-served.

Markets for pirate or illegal materials are only created when the legitimate channels for distribution and payment do not satisfy consumer demands, or when they run counter to the self-interest of one or more of the major legitimate participants, including the consumer.

Although CODART is very sophisticated technically and can, through technical means, protect copyright, it much more importantly addresses the copyright problem through increased efficiency in the legitimate marketplace. It encourages a fair and equitable structuring of the interaction among recorder manufacturers, software producers, broadcasters and consumers.

It is a flexible system that can respond to the variations of the home recording marketplace. Producers and distributors can designate certain materials -- say those with commercials or those used primarily for time-shift viewing -- as appropriate for open-air recording, and can designate other materials as pay-per-record. Such a system puts the responsibility for reimbursing artists directly where it ought to be: with those who are benefiting from the creative materials.

In short, by making legitimate materials less expensive and more convenient for the consumer to record than illegitimate materials, and by paying copyright royalties, CODART illustrates that technology already addresses the fundamental incentives that underly unauthorized off-air recording, the sale of illegally-produced copies of programs and the informal lending network, all of which result in opportunities for copyright infringement.

CODART has had substantial indication of recorder manufacturers' willingness to integrate CODART circuitry directly into their machines. I would add that these indications came well before the 9th Circuit decision, and that several leading manufacturers are currently in the process of evaluating the system for adoption. They are interested for the system's marketplace sensibility. By passing a percentage of each legally-made recording to the manufacturer of the recorder on which it was made, CODART creates, for the first time, an incentive for the hardware manufacturer in copyright protection mechanisms. As it passes revenues to copyright holders, CODART simultaneously encourages the sale of recorders and creates an on-going revenue stream.

In this era of diminishing regulation and increased reliance on marketplace forces, nowhere is there greater or faster development and change in the marketplace than in telecommunications and technology. The law must keep pace with these developments. Whether CODART or another system, technology may have already outpaced the solutions embodied in S. 1758 and Amendment 1333. We would encourage the Congress to defer to the 20th century combination of technology and the marketplace where the problem can be most efficiently, and most fairly, resolved.

Thank you for this opportunity to present our views.

npma National Music Publishers' Association · Inc.

110 EAST 59 STREET · NEW YORK N.Y. 10022 · (212) PLAZA 1-1930 · *Established 1917*

STATEMENT OF SALVATORE T. CHIANTIA, CHAIRMAN, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

The National Music Publishers' Association (NMPA) is the 65-year old trade association of the American music publishers. Our 280 members, located in more than 20 states, include publishers of music of all types -- popular songs and symphonies, hymns and educational music, operas and soul and country -- every expression of music creativity. Most of our member companies are small businesses with less than a dozen employees.

NMPA emphatically supports Amendment No. 1333 to S. 1758, which we believe to be a reasonable, balanced, and necessary response to the issue of home audio taping. In doing so, we join the many segments of the musical arts community that have come together as The Coalition to SAVE AMERICA'S MUSIC.

The reaction by the music community to recent home taping developments has been unique and a demonstration of unity of all facets of the music community. Never in our history has there been such a coming together, such a cohesiveness, such a common purpose.

The reason this has happened now is quite simple -- home audio taping -- more particularly, uncompensated home audio taping -- poses a dire threat to all of our livelihoods, to all of our jobs, and -- at bottom -- to the unique product of our combined efforts, the unparalleled richness and diversity of American music.

The Coalition To SAVE AMERICA'S MUSIC has evolved since the beginning of this year in response to the home taping confrontation, a problem to which the legislation before you is addressed. It is made up of 19 national music organizations -- not only writers, publishers, performers and record companies, but other trade and professional associations, unions, performing rights organizations and associations devoted to black, country and gospel music. It also embraces organizations made up of consumers of music, music lovers, record buyers, and record stores that also sell blank tape. The National Music Council, itself made up of 59 music organizations, has passed a Resolution that is attached to this statement as well as a complete list and brief description of the organizations that make up our Coalition.

The witnesses you will hear will provide you with full details of the devastating impact of home audio taping on the music community and, ultimately, on the public. NMPA would like to particularly note the interest of the segment of that community that it represents -- music publishing.

NMPA is a proud member and central element of America's music community. The music that we publish sets the standard for the whole world. Our music makes a real, albeit comparatively modest, contribution to our balance of payments. Its importance as a cultural export cannot be overestimated. It is the American idiom that is the most universally understood and appreciated, and continues to be our most welcome ambassador.

Music publishers are a class of copyright owners to whom fair compensation for audio recording would be assured under Amendment No. 1333. We are copyright owners because composers and lyricists entrust their creative work to us. And the writers' work -- music -- is a publisher's only business. Their creativity is the publisher's only product. Financial support of writers and promotion to popularize their works and management to assure its optimum circulation is our basic function. The financial return that we receive from licensing the rights created by copyright is what enables us to continue to do our work and our incentive to encourage the creativity of our composers and authors.

Royalties from recordings represent a major and essential source of income to lyricists, composers and their publishers. Statistical data have made very clear that these royalties have been already considerably diminished by reason of widespread private audio taping.

Technology in the immediate future threatens to make the taping process easier. Home taping thus causes present financial and cultural injury and future menace. The inevitable result is clear -- taping will increase. No one can question this. Revenues to lyricists, composers and their publishers from recordings will further diminish as a result of lost sales and lost royalties. If the rewards that creative people may reasonably expect diminish, so, too, will the sum total of available recorded music itself tend to diminish. We would have fewer and fewer songs recorded, fewer and fewer works of the mind and spirit that enrich our lives. And, finally and ironically, though there may be more tape recorders, there will certainly be less music to copy.

Our purpose in submitting this statement is to ask your assistance in avoiding this ultimate result. But we do not ask that you forbid or even inhibit individuals from home audio taping; we do not ask that you stem technological progress or impede the manufacture and distribution of audio recording devices and tape; we do not ask that you impose liability on private individuals or intrude on personal privacy; and we do not ask that you create for us a new source of income, or a new right.

We do ask only your assistance in preserving the value of our historical recording right in the face of the onslaught of recording technology; and we ask that you do so by providing a workable system of fair compensation from those businesses that base their profits and revenues on the recording of our works.

The royalty that would be provided by Amendment No. 1333, as determined by the Copyright Royalty Tribunal, can in no way be considered a windfall or supplementary income. Its purpose would be to offset, in part, losses that are clearly demonstrated by the economic data to be presented to you.

As you consider this issue, NMPA urges you to view it in proper context. Amendment No. 1333 is not, as its opponents would have you believe, a legislative aberration or radical exercise. To the contrary, it is in the best tradition of this Committee and the Congress. Consider the following:

In 1909, Congress created a new right in our copyright law -- the recording right. Since 1909, it has become an increasingly essential source of income to composers, lyricists and to us, the publishers. It is now and has been for many years a fundamental component in the economic incentive to authorship envisioned in the Constitution. Home taping dilutes that incentive and undermines the recording right.

This is not a new phenomenon. In many areas, copyright and new technologies have headed on a collision course. Thanks in large part to the efforts of this Committee, the collisions have been avoided in other areas of potential conflict. You have, in all other cases, striven to preserve the historical values, traditions and purposes of our copyright system without hampering the development of new technologies or denying their benefits to the public.

You have consistently sought to maintain the principles of copyright in balance with all other pertinent interests and, where necessary, you have supported, actively encouraged, and developed innovative legislation to accomplish that end. We trust that you will do so again, and continue this time-honored policy of intelligent, innovative law-making that guarantees our citizens the enjoyment of the products of technological and scientific genius while ensuring that the incentive to creators of the useful arts not be denied or abandoned.

We commend Amendment No. 1333 to S. 1758 to your favorable consideration as just such a measured, balanced response that accommodates all legitimate interests, both public and private.

Article 1, Section 8 of our Constitution could not be better served.

NATIONAL MUSIC COUNCIL
A Non-Profit Membership Corporation • Founded in 1940 • Chartered by the Congress of the United States in 1957
Chairman of the Board: Gunther Schuller President: Victor W. Fuentealba
First Vice President, Lucile Ward; *Second Vice President*, Hal David; *Third Vice President*, Edward M. Cramer; *Secretary*, Patricia Stenberg; *Treasurer*, Gene Wenner; *Archivist*, Donald L. Leavitt; Board of Directors: The Officers and following Members-at-Large: Arnold Broido, Schuyler Chapin, Donald Dillon, Leonard Feist, Catherine French, Stanley Gortikov, Samuel Hope, Natalie Limonick, Merle Montgomery, Allen Sapp, Francis Thorne.

January 28, 1982 FOR IMMEDIATE RELEASE

NATIONAL MUSIC COUNCIL BACKS ROYALTY SYSTEM FOR AUDIO AND VIDEO HOME TAPING

The National Music Council has unanimously voted to support development of "an equitable royalty system" to apply to home taping of both audio and video recordings.

In a meeting held here recently, a resolution supporting federal legislation in favor of such royalties was approved by the NMC, a federation of 59 diverse music groups whose 1,500,000 members include composers and lyricists, singers, teachers, publishers, music licensing organizations, and musicians.

Announcement of the resolution was made by Victor Fuentealba, president of the Council, and president of the American Federation of Musicians. It was introduced by a representative of the National Academy of Popular Music with the approval of the American Guild of Authors and Composers and the Nashville Songwriters Association International. It represents the response of three major songwriters groups to legislation introduced to Congress last year that would exempt home video taping from the copyright laws, depriving creators and production firms of substantial income. It was also the consensus of those who represented many organizations at the New York meeting that the draft bills would seriously reduce job opportunities, injure careers, and discourage creation of new works.

The adopted resolution endorsed the principles embodied in an amendment proposed by Senator Charles Mathias (R., MD) that would have the Copyright Royalty Tribunal work out a fair royalty method to compensate copyright owners. Among the methods suggested to accomplish this, with minimum complications and inconvenience to consumers, is to impose moderate royalties on the manufacturers of blank tapes and recording equipment. These royalties are already being imposed in several European countries.

Full text of the resolution passed by the members of the National Music Council is as follows:

> "It is hereby resolved that the National Music Council firmly supports the principles embodied in Senator Mathias' proposed amendment to S.1758 and vigorously supports their application to both audio and video recordings so that an equitable royalty system may be developed to insure the health and growth of American music."

Coalition to SAVE AMERICA'S MUSIC

AFM - American Federation of Musicians

Membership, 300,000, affiliated with the AFL-CIO. Protects the employment rights of professional musicians in all fields in the U.S. and Canada, including collective bargaining agreements.

AFTRA - American Federation of Television & Radio Artists

Membership, 55,000. Negotiates and administers collective bargaining agreements for professional performers and broadcasters for live and taped broadcasts, phonograph recordings and audio-visual productions.

AGAC - American Guild of Authors & Composers

Membership, 4,000. Protects its American songwriter membership through the AGAC Contract in dealings with music publishers.

ASCAP - American Society of Composers, Authors & Publishers

Membership, 30,000. Founded in 1914 to license and collect fees for rights to public performances of its members' copyrighted musical works, and to distribute such income.

BMA - Black Music Association

Membership, 2,000. Includes performers, producers, promoters and record company executives whose objectives are to promote, perpetuate and preserve black music.

BMI - Broadcast Music, Inc.

Affiliates, 63,000. Founded in 1940 to represent writers and publishers and to license, collect and distribute fees for their publicly performed musical repertory.

CMA - Country Music Association

Membership, 6,000, including international representation.

Trade association dedicated to promoting and preserving country music through such activities as the CMA Awards Show and the Country Music Foundation.

GMA - Gospel Music Association

Membership, 2,000, with international representation.

Service organization to represent, promote and provide information about gospel music, including presentation of the annual DOVE Awards.

MPA - Music Publishers' Association of the United States

Membership, 61. Objectives are to promote the continuing education of music publishers, nationally and internationally, and to foster good relationships with the music trade.

NMA - Nashville Music Association

Membership, 805, including 95 founding members.

Trade association dedicated to represent all forms of music entertainment in Nashville.

NSAI - Nashville Songwriters Association International

Membership, 2,000. Dedicated to the advancement of musical composition and protection of member rights. Association holds educational seminars and maintains a Hall of Fame.

NAPM - National Academy of Popular Music

Membership, 350. Maintains Songwriters Hall of Fame, museum and reference archives on popular music, and annually elects members to its Hall of Fame.

NARAS - National Academy of Recording Arts & Sciences

Membership, 5,000, involved in the creative process of sound recording. Members, including singers, musicians, songwriters, composers and engineers, vote for and present annual GRAMMY Awards.

NARM - National Association of Recording Merchandisers

Regular membership, 225 companies consisting of retailers, rack-jobbers and independent distributors of sound recordings. Trade association founded in 1958 to protect the interests of the merchandising community and to promote the industry. Associate members include record companies and suppliers.

NMC - National Music Council

Membership, 1,500,000 in 61 national music organizations. Umbrella organization chartered by Congress to function as an information and coordination service for members that include composers, lyricists, musicians, singers, teachers, publishers, music licensing groups and recording companies.

NMPA - National Music Publishers' Association

Membership, 275 publishers. Trade association representing publishers of American music, including fields of popular, classical, sacred, educational, concert, gospel and country music; collects and administers royalties through the Harry Fox Agency.

RIAA - Recording Industry Association of America

Membership, 55 U.S. sound recording companies. Trade association founded in 1952 to work for the mutual interests and betterment of the industry. Activities include Anti-Piracy Intelligence Unit and certification of RIAA Gold/Platinum Record Awards.

RIAA/VIDEO - Recording Industry Association of America/Video Division

Membership, 25 U.S. video recording companies. Trade association founded in 1980 to represent interests of emerging video recording industry and to work for its betterment and expansion.

SESAC - SESAC Inc.

Affiliates, 1,500. Licenses and collects fees for use of the works of its 1,000 songwriter and 500 publishers members, and actively promotes its membership.

SPARS - Society of Professional Audio Recording Studios

Membership, 100 recording studios, major manufacturers, record companies and producers. Trade association dedicated to excellence through innovation, communication and education.

STATEMENT OF JON A. BAUMGARTEN

My name is Jon Baumgarten. I am a partner in the law firm of Paskus, Gordon & Hyman. For virtually all of my professional life I have been involved with copyright law and the development of copyright legislation, both in private practice and in public service.

For a number of years, as General Counsel to the Copyright Office, I had the privilege and personal pleasure of working closely with members and staff of the Congress in the development and fine-tuning of the new Copyright Act. I witnessed, first-hand, the painstaking efforts of Congress and this Committee to preserve the Constitutional purpose of copyright in modern society, and to balance and accommodate all legitimate interests while meeting that goal -- a task that was never simple, but one never better served by a legislative body. In my judgment, the issue now before you -- home recording, and its attendant incidents of technological progress, devastating economic impact on copyright owners, and individual privacy -- is one that should be resolved, promptly, by the Congress; and one that can be resolved, fairly, with the leadership of this Committee.

I am pleased to note that I am joined in this view, and in my remarks to follow, by one of our country's preeminent copyright scholars, Professor Melville Nimmer, whose full analysis is attached as Appendix 6 to the prepared submission of the Recording Industry Association of America.

One theme that has recurrently surfaced during the course of this debate is the purported existence of a home audio recording exemption under the current copyright law. I have carefully reviewed this question in my attached memorandum of March 8, 1982 to the National Music Publishers' Association. And in his analysis, Prof. Nimmer has examined the issue with his well known scholarship and insight. Working independently of each other, and with somewhat varying approaches, we have reached identical conclusions:

First: There is no exemption for home taping of copyrighted sound recordings or musical works under current law. There is no express statutory exemption; and there is no basis for an alleged "implied" exemption under the 1976 Act. (Indeed, the legislative history of the 1976 Act suggests quite the contrary.)

Second: Home audio taping cannot be forced within the doctrine of fair use. It fails to meet even a single criterion of that principle. To subsume wholesale, unauthorized reproduction of songs and sound recordings for their entertainment value within fair use would be a total distortion of that doctrine. The opponents of Amendment No. 1333 have characterized fair use as the "safety valve" of copyright -- but it is a "safety valve" because it serves to assure that copyright does not stifle later creative effort; it serves to permit the later productive use of reasonable portions of one work in creating others. It was not designed to threaten continued creativity -- in the manner described by the witnesses appearing on behalf of the musical arts -- by permitting the appropriation of entire works for their own sake. To apply fair use to home audio recording would turn the doctrine on its head.

Third: The fact that home audio recording occurs in the home does not make it fair use or otherwise exempt from infringement. To the extent that the privacy aspect of home recording merits special consideration, it calls for judicial or legislative innovation in fashioning relief, not for an abdication of copyright's purpose, and of copyright's principles.

The reasons behind these conclusions are spelled out in detail in the two legal memoranda I have referred to. Although we are confident they would prevail in a court of law, I think it necessary, if only because of the reliance of opponents to Amendment No. 1333 on the purported exemption, to state the obvious -- we are not in a court of law.

We are not asking that you declare what the law was in 1971, or 1978, or even today.

We are asking your assistance in assuring that the law in the time to come will -- fairly, practically, and efficiently -- deal with a crucial and increasingly critical problem to the community of musical arts.

This is hardly an unprecedented or previously unanswered type of request. As one example only, from 1909 to 1976 our law embodied a general not-for-profit limitation on performance rights in musical works. In the 1976 Act, Congress -- this Committee -- examined the blanket exemption in light of the full record and contemporary developments; and you abandoned it in favor of a more specific and balanced approach to the question, one more in tune with modern times. The reports of both the Senate and House Judiciary Committees on this point are particularly pertinent to the question now before you. After examining the impact of a general not-for-profit exemption on copyright owners in today's society, the reports concluded that "in the future a broad 'not-for-profit' exemption could not only hurt authors but could dry up their incentive to write." S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) at 59; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 63.

Finally, and in any event, to those who argue that the individual should "continue to" be exempt, or should now be declared to be exempt, from liability for infringement by home recording -- I would answer: I agree. But I urge that this exemption be balanced by an equitable system to assure fair compensation to copyright owners, and I recommend your favorable consideration of Amendment No. 1333 to S. 1758.

Thank you for the opportunity to present these views.

PASKUS, GORDON & HYMAN

MEMORANDUM March 8, 1982

For: National Music Publishers' Association

From: Jon A. Baumgarten

Subject: Private Audio Recording of Copyrighted Music

At your request we have reviewed the question of whether the private or "home" audio recording of copyrighted musical works (e.g., from broadcasts or from pre-recorded discs or tapes) is exempt from infringement under the copyright law. For the reasons given below, we conclude that the law does not exempt such activity from infringement.

A. The Copyright Act of 1976

The 1976 Copyright Act, which became effective on January 1, 1978 (Act of October 16, 1976; P.L. 94-553, 90 Stat. 2541, now codified in title 17, U.S.C.), culminated a process of over twenty years of thorough, searching examination of the relationship of copyright to improved technologies affecting recording and reproduction of copyrighted works. See, S. Rep. No. 94-473, 94th Cong., 1st Sess. 47-50 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 46-50 (1976). Among the exclusive rights of the copyright owner is the right to "reproduce [the work] in . . . phonorecords" (17 U.S.C. §106(1)); this clearly includes the reproduction of musical works and sound recordings in audio tapes. See 17 U.S.C §101 (definition of phonorecord). The Act then sets forth, in great detail, specific limitations and exemptions on and to those rights (17 U.S.C. §§107-118). There is no statutory exemption or limitation for private or home audio recording of musical works or sound recordings. Even the possibility of such a limitation or exemption existing outside of this express statutory framework is blatantly inconsistent with Congress' deliberate design of first setting out the copyright owner's rights, and then subjecting them to carefully developed, balanced, and explicit exemptions and limitations. See, e.g., S. Rep. No. 94-473, 94th Cong., 1st Sess. 57, 59 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 61, 62 (1976).

In any event, no basis for such an exemption or limitation can be found in the history of the 1976 Act. Indeed, even assuming that reference to legislative history would be appropriate in the face of the unambiguous language of the Act, that history clearly indicates that Congress did not intend any "home" or "private" recording exemption. For example, the 1976 House Report expressly acknowledged that infringement does result from "recapturing [sounds] off the air." H.R. Rep. No. 94-1476, supra at 106 (1976). Additionally, the reports on the 1976 Act show that Congress deliberately and carefully avoided imposing any general "non-commercial" or "not-for-profit" exemption on the rights of copyright owners. See, e.g., S. Rep. No. 94-473, supra at 59; H.R. Rep. No. 94-1476, supra at 66. And the House Report notes that "taping" is not given "any special status" under the Act. H.R. Rep. No. 94-1476, supra at 66; see also, S. Rep. No. 94-473, supra at 62.

Moreover, when Congress did express special solicitude for audio taping or off-air recording, it limited its concern to educational uses and imposed and endorsed strict limitations and conditions on even those uses. See, e.g., H.R. Rep. No. 94-1476, supra at 71 and H.R. [Conference] Rep. No. 94-1733, 94th Cong., 2d Sess. 70 (1976) (Guidelines for Educational Uses of Music; note Guidelines A(4) and (5)); S. Rep. No. 94-473, supra at 65-66 (off-air recording of television programs by educational institutions under certain circumstances); H.R. Rep. No. 94-1476, supra at 71 ("limited" application of fair use to off-air taping by educational institutions);* Cong. Rec., September 22, 1976 at H. 10875 and H.R. [Conference] Rep. No. 94-1733, supra at 70 (off-air recording of television programs by educational institutions for the deaf and hearing impaired);17 U.S.C. 118(d)(3) (off-air recording of noncommercial educational broadcasts of musical works by nonprofit institutions for educational use under certain conditions).

Additionally, the House Judiciary Committee, when specifically considering the audio duplication of recordings for purposes of scholarly research by musicologists, did not even suggest that the Act contained an exemption for such use. Instead, it noted that the issue was being handled by licenses from copyright owners and that, should it become necessary to go beyond this, additional legislation could be undertaken. H.R. Rep. No. 94-1476, supra at 107. It is impossible to reconcile these carefully limited Congressional reflections on duplication in the favored areas of education and scholarly research with a presumed blanket exemption for duplication for entertainment purposes. Indeed, the Senate Judiciary Committee's report on the 1976 Act emphasized that: "The Committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered 'fair use'." S. Rep. No. 94-473, supra at 66.

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*The House Committee requested the parties to develop guidelines for fair use in such circumstances. These guidelines were recently adopted and were endorsed by Chairman Kastenmeier of the House Copyright Subcommittee. See Cong. Rec., October 14, 1981 at E 4751. As in the situations noted above, they include strict conditions and limitations on even this educational use; and Mr. Kastenmeier observed that "beyond these guidelines specific permissions from copyright owners may be required under the Copyright Law." Id.

Note must also be taken of a letter dated November 23, 1977 from the late Senator John McClellan, then Chairman of the Senate Subcommittee on Patents, Trademarks and Copyrights and a leading participant in the copyright revision process, to the Chairman of the Copyright Royalty Tribunal, requesting the Tribunal to examine "the complex of issues arising from the rapid expansion of taping machines" and "all aspects of the taping issue," and to make such legislative recommendations as it deemed advisable. This request is hardly consistent with a conclusion that the Congress had already determined that home taping was exempt.

Finally, a general exemption for private audio recording cannot be forced into the framework of "fair use" under section 107 of the 1976 Act. Such activities reproduce entire copyrighted musical works and sound recordings for the purposes of individual entertainment. "Home" and like audio recordings thus commonly fulfill precisely the same function as authorized phonorecords of music and sound recordings, and directly replace the market for such phonorecords to the detriment of composers, lyricists, publishers, performing artists, and record companies. They fail to meet even a single criterion of the fair use doctrine.*

B. The 1971 Sound Recording (Anti-Piracy) Amendment

The notion that private audio-recording of copyrighted musical works is exempt from the Copyright Act appears to rest entirely on a few fragmentary occurrences in the House of Representatives during its consideration of the 1971 Sound Recording ("Anti-Piracy") Amendment (Act of October 15, 1971; P.L. 92-140, 85 Stat. 391) to the 1909 Copyright Act. The simple answer is that the 1971 Sound Recording Amendment is not pertinent; the controlling law is now the 1976 Copyright Act. As discussed above, the 1976 Act does not exempt home recording from infringement. (The few isolated references to home recording made during consideration of the 1971 Amendment are absent from the record of the 1976 Act. Although portions of the House Report on the 1971 Amendment were repeated in the Senate and House Reports on the 1976 Act, the earlier report's single reference to home recording is pointedly omitted from the 1976 Act Reports; in its stead, the 1976 Reports declare that "infringement" does result from "recapturing [sounds] off the air" and indicate that "off-the-air recording for convenience" would not be considered fair use. See pp. 2, 4 *supra*.)

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*Private audio recording may be argued to be "non-commercial," but even this, particularly when taken together with the amount used and the purpose (entertainment) and effect of the use, would not lead to a conclusion of fair use. *Cf.*, e.g., *Wihtol v. Crow*, 309 F. 2d 777 (8th Cir. 1962); H.R. Rep. No. 94-1476, *supra* at 66. And section 107 does not even refer simply to "non-commercial" use as a pertinent factor; it does refer to consideration of "whether the use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. 107(1); see also, 17 U.S.C. 107 (introductory paragraph).

In fact, it may be added that the 1971 Sound Recording Amendment clearly did not exempt home recording of musical works from infringement.* That amendment was directed toward an entirely new form of limited** protection to be accorded sound recordings; it did not in any event purport to limit the protection already long established under the then-controlling 1909 Copyright Act, without any hint whatsoever of a "private" or "non-commercial" reproduction exemption,*** for musical compositions. (One passage from the House Report on the Sound Recording Amendment does make some reference to recorded music. H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971). But the amendment simply did not deal with the scope of rights in musical works; hence this reference could, at most, have been the 1971 House Committee's unstudied reflection on the rights accorded to music under the 1909 Copyright

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* It is important to note that phonograph records and pre-recorded tapes commonly embody two entirely distinct copyrighted works, each having its own particular history in the development of copyright legislation: (i) the recorded "musical work" representing the efforts of individual composers and lyricists and their publishers; and (ii) the "sound recording," representing the efforts of performing artists and record companies (see 17 U.S.C. §101). Until the 1971 Amendment, the copyright law did not provide a copyright in sound recordings, while musical compositions have been protected by copyright since 1831.

** The protection accorded to sound recordings under the 1971 Amendment was acknowledged to be "limited" and more restricted than that available to other copyrighted works. See, e.g., H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 1-2 (1971); S. Rep. No. 92-72, 92d Cong., 1st Sess. 1-2 (1971); see generally, 1 Nimmer, Copyright §109.21 (1976 Ed.).

*** This is to be contrasted with the specific statutory limitation of performing rights in music to "public," "for-profit" performances under the 1909 Copyright Act.

Act. It could not have been probative of the meaning or "intent" of the 1909 statute. E.g., Rainwater v. U.S., 365 U.S. 591, 93 (1958). Even more fundamentally, the 1971 Report referred to "unrestrained" home recording, a categorization probably best attributable to a lack of enforcement (under the circumstances and considering off-air technology of the preceding decades), and not even to an assumed exemption from copyright.)

Moreover, the few references to home recording in the record of the 1971 Sound Recording Amendment appear only in the House proceedings, after Senate passage of the bill embodying that Amendment, and in connection with the Senate bill. No similar considerations appear in the pertinent Senate proceedings. These isolated observations in the course of House consideration cannot be assumed to reflect any "intent" of the originating chamber, or of Congress generally, with respect to musical works (or even sound recordings). Additionally, it is clear that these references were made in the context of comparing the activities of private duplicators with the commercial "pirates" toward whom the bill was specifically directed, and of acknowledging only the difficulties of enforcement against the former. They simply did not purport to "exempt" private duplication from the scope of the copyright owner's rights under the prior Copyright Act. (In fact, in one colloquy that has been represented as support for a home exemption under the Amendment, the Assistant Register of Copyrights acknowledged that the 1971 Sound Recording Amendment was "not addressed to" the issue of home recording, and that home recording then -- unlike now -- was not in a state of "crunch" with respect to its impact on copyright owners, and suggested that future legislation (which would be unnecessary if home taping were simply exempted) might become appropriate. Hearings on S. 646 before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22-23 (1971).)

Finally, these few references can hardly be considered to reflect a deliberate, considered Congressional treatment of the home taping issue, or the firm delineation of a broad "exemption" for private or non-commercial recording, even with respect to sound recordings during the period preceding the effective date of the 1976 Copyright Act. *Cf.*, e.g., *Libby Rod & Gun Club, Inc. v. Poteat*, 594 F. 2d 742, 746 (9th Cir. 1979). The 1971 Amendment was a hurried, tentative, stop-gap measure, and was specifically intended to deal only with reproduction of sound recordings by commercial record pirates.* At the very least, the amendment was not directed toward or pertinent to any limitation on the existing

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*The 1971 Sound Recording Amendment was initially enacted as a temporary measure only, hurriedly passed in response to the immense growth of record piracy and terminating with respect to sound recordings fixed on and after January 1, 1975, in order to provide a deterrent to a specific activity -- commercial record piracy -- while leaving time for full consideration of *all* pertinent issues during the course of omnibus copyright revision. See, e.g., H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 2-3 (1971). The amendment was extended at the last minute, in December 1974, only when it appeared that omnibus revision would not be completed before the terminal date and that to allow expiration would leave record piracy rampant and our treaty obligations unfulfilled. Act of December 31, 1974; P.L. 93-573, 88 Stat. 1853. See, e.g., H.R. Rep. No. 93-1581, 93d Cong., 2d Sess. 2-3 (1974).

rights of *music* copyright owners.* But most fundamentally, from its inception the 1971 Amendment was designed to be, and was, supplanted by the more thorough and comprehensive revision efforts that culminated in the Copyright Act of 1976 -- and the 1976 Act does not provide an exemption for private or home audio recording of musical works or sound recordings.**

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*There is nothing unique in the concept of a particular use of a sound recording being non-infringing *vis-a-vis* the sound recording itself, but infringing *vis-a-vis* the music embodied therein. Thus, an unauthorized public performance of a copyrighted sound recording would not infringe that work, though it would infringe copyright in the embodied musical composition. 17 U.S.C. §§106(4), 114(a). And an unauthorized recording of an imitation of recorded sounds would not infringe the sound recording copyright, but would infringe the copyrighted recorded musical work. 17 U.S.C. 114(b). See also, e.g., 17 U.S.C. §108(h).

**It is not true, as some have suggested, that the 9th Circuit's opinion in the *Betamax* case found a private use exemption, deriving from the history of the 1971 Amendment, for audio recording under the current Act. The Court of Appeals' analyses of the "statutory framework" of the 1976 Act, the relevance of purported "legislative history," and the fair use doctrine fully support the reasoning and conclusions of this memorandum. Indeed, the Court specifically quoted Professor Nimmer's observations that the legislative history of the 1971 Amendment could not have applied to musical works and is not pertinent to the question of home recording under the 1976 Act. *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F. 2d 963 n.5 (9th Cir. 1981).

April 21, 1982

STATEMENT OF JOHN MARMADUKE BEFORE THE SENATE JUDICIARY COMMITTEE

RE: AMENDMENT NO. 1333 TO S. 1758

My name is John Marmaduke.

I am the president of Hastings Books & Records of Amarillo, Texas, a chain of 92 record and book stores in the Southwest, Midwest and Rocky Mountain area. We also are a wholesale and distributor in the same market area. I am a member of the National Association of Recording Merchandisers, and the immediate past President of that organization. I have been a part of the record industry for 13 years.

I am here to speak in support of Amendment No. 1333 to S. 1758, particularly its Fair Marketing provision. I am also here to report that the NARM board of directors representing over 15,000 retail and wholesale accounts voted on March 25, 1982, to support, without reservation, the principle of reasonable compensation for home taping of records and tapes embodied in Amendment No. 1333 to S. 1758.

We merchandisers will never see a dime of any royalties, yet we recognize that our best interests are served by the preservation of a healthy music industry.

Home taping has forced record production down and record prices up. As a result, record sales in 1981 were down by $1/2 billion over 1978. It's my impression from personally observing retail sales of both blank and pre-recorded tapes that the decline in pre-recorded sales has mirrored the growth in home taping. This trend is hurting every one of us in record wholesaling and retailing; and it is precipitating a new commercial practice that poses an even greater threat to our industry -- the practice of record rentals. That is what I want to comment on in this Statement.

Why are record merchandisers concerned about record rentals? If you look at foreign countries where it's occurred, the damage to legitimate wholesalers and retailers has been substantial. Less than two miles from this very hearing is the first sign that this cancer is coming to the United States. The first record rental outlet that I know of was opened in the United States in September 1981. Additional outlets are planned in cities across the country. The impact on retail record sales when rental outlets are opened nationwide will be devastating in my opinion and the opinion of our NARM members.

Well, what's wrong with these rental outlets? Why shouldn't they rent records? I'll tell you why.

1. It's unfair competition. I'm paying the artists for their creative work with each sale. The record rental store only pays once. This puts me at a competitive disadvantage.

2. It's immoral -- records aren't vinyl -- they are creative works of countless individuals. Customers don't come into my stores to buy records -- they buy the work of artists.

3. If these artists aren't compensated, their commercial activity and creativity will decline, and my business with it.

4. Finally, record rentals aggressively promote home taping, and you've already heard about the impact that home taping is having on our industry.

It's like Gresham's law, where debased currency drives legitimate currency out of the marketplace. Unless the law is changed, unauthorized record rentals will continue to grow at the expense of legitimate record sales, and hurt the entire music industry in the process.

For all these reasons I urge this Committee to report favorably on Amendment No. 1333 to S. 1758.

STATEMENT OF JOAN GANZ COONEY

PRESIDENT, CHILDREN'S TELEVISION WORKSHOP

The Children's Television Workshop, a non-profit organization supports the Mathias, Baker, Byrd Amendment, (#1333) to S, 1758 because it is a fair and equitable approach to balancing the needs of producers of creative materials, such as CTW, and the public's desire to use the full fruits of modern technology. The Children's Television Workshop is a producer of quality educational television programming for children. We are best known as the producers of SESAME STREET, a daily series for pre-schoolers; THE ELECTRIC COMPANY, a daily series on reading; and 3-2-1 CONTACT, a daily series on science and technology for children 8-12.

For those of us who see the impact of home TV on education of children as a way to encourage growth, development of the video cassette recorder (VCR) promises to add to the effectiveness of such programming. We believe that the home video recorder represents a technology that will help expand children's viewing options, improve program choice and encourage parental involvement.

We also know, however, that the production of quality educational television programming for children is expensive -- and getting more so -- while funds available to support production are shrinking very rapidly. Because of this, the Children's Television Workshop usually invests significant funds from its own limited resources to ensure that production is of the highest quality -- or can be undertaken at all. For example, we pay nearly 70% of the costs of SESAME STREET each year -- currently about $6 million in our own funds.

We struggle to earn the funds needed to keep SESAME STREET and our other educational programs on the air through a carefully executed program of licensing, publishing and other activities based on our ownership rights of our programs. Everything we earn goes to further our educational work; as a non-profit organization we pay no dividends to stockholders. Any opportunity to earn money that we are deprived of limits our ability to keep SESAME STREET on the air.

Quite frankly, as copyright owners we feel entitled to all the benefits implied by that ownership -- including our fair share of royalties to be derived from off-the-air recording of our programs and music. As a practical matter we will need the benefits of those royalties to help pay the ever-increasing cost of producing SESAME STREET. Such funds are of marginal importance to individual owners of VCR's and other recording equipment. Aggregated together they will be vital to our work.

Amendment 1333 to S. 1758 would: (1) permit individuals to record copyrighted audiovisual programs; (2) provide a royalty fee for copyright owners whose copyrighted material is recorded by means of the home video recorder; and (3) administer this program through an existing governmental body, the Copyright Royalty Tribunal. We endorse this amendment because of the beneficial effects it will have upon the quality of children's and other programming.

First, it will provide incentives and resources for increased production of such programming. It is self-evident that compensation is a necessary motivating factor in the creation of intellectual work.

Even the most creative genius would not long survive if she was unable to be justly rewarded for the fruits of her labors. And producers of this programming must have the resources to cover their losses for programs that are unsuccessful or for innovative and experimental work. A royalty fee for the recording and use of copyrighted material by home viewers will provide needed financial impetus for continued creative work.

Second, it appears that an exemption from copyright liability for home video recording without a royalty fee would accomplish precisely what S. 1758 seeks to avoid: a limitation on television access to high-quality programming. It is possible that program producers, denied of compensation for repeated use of their property through home video recording, would make an economic decision to limit the markets in which their products are shown. In this manner, many creative works could be restricted to markets which, by their nature, prevent any recording with a home video recorder. Limiting access to programming seems to be a harsh and undesirable method for dealing with this issue.

We at the Children's Television Workshop want our materials to be viewed as widely as possible. The most certain way for Congress to ensure that no impediments are placed in the way of expanding the growth of our kind of programming is to keep the principle of copyright intact in face of new technologies. The Mathias, Baker, Byrd amendment does that and we hope you will quickly act to pass this legislation.

Thank you.

STATEMENT REGARDING AN ALTERNATIVE SOLUTION TO THE OFF AIR VIDEO TAPING ISSUE IN HOMES AND SCHOOLS

WHO SHOULD RECEIVE AN OFF AIR VIDEORECORDING EXEMPTION?

The purpose of this statement has to do with children and students in schools throughout the United States. If the educational welfare of our future citizens is important to you or those you represent, I urge you to strongly consider the following information. This presentation includes a proposed solution that will provide increased benefits to school children and to copyright proprietors. It may be easily applied to the development of a more simple and fair solution to the problems associated with video recording in The home. The question must be asked: Which is more important, an exemption for learning or an exemption for home entertainment?

WHY SHOULD SCHOOLS BE BROUGHT INTO THE DEBATE OVER THE USE OF BETAMAX EQUIPMENT IN THE HOME?

The primary early market for video recorders having the capacity to time shift the delivery of TV programs was the educational or school market. This type of equipment has been available and purchased in large quantities by schools for more than 20 years - first in the open reel format and more recently in videocassette forms. The problem is not a small one. A study conducted by PBS more than 4 years ago showed 500,000 teachers and more than 11 million students involved in learning from shows recorded from the airwaves. More than 95% of schools owning TV equipment use it to tape from the air.

A BRIEF BACKGROUND OF RECENT EVENTS.

The most recent court decision in the debate over the Betamax Off-Air Recording controversy has held that recording of copyrighted television programs by individuals in their homes is illegal. At the same time, the Justices (Kilkenny, Canby, and East), of the U.S. Ninth Court of Appeals recognized that to enforce a law forbidding home recording, or halting the sale or production of video recording equipment would be impractical, and perhaps impossible. Some form of "continuing royalty" to repay copyright proprietors was offered by the Justices as a possible solution to the problem. Amendments to create a tax either on blank tape or equipment have been recently introduced in the United States Senate and House of Representatives. Once a "pot" of tax revenue is collected, how will the monies be fairly distributed back to those who created the original programs? Most royalty proposals require a complex government mechanism to manage and distribute the funds.

At the same time, a Robert Kastenmeier committee has printed Fair Use guidelines (which do not have the force of laws), in the October 14, 1981 issue of the Congressional Record. The guidelines allow schools to record any program to use for instruction for 10 days, and to hold for faculty preview up to 45 days.

THE PUBLIC SERVICE TAX CREDIT IS SUGGESTED AS A POSSIBLE SOLUTION.

It provides a fair and direct method of repayment to copyright owners suggested by the court. Students in several foreign countries have full and ongoing access to television programs on the Public Airwaves. Should our students receive similar benefits? Producers, or other owners of the copyright for each TV program broadcast on the public airwaves, would be allowed a limited amount of tax credit in exchange for school rights to copy and indefinitely retain programs for face-to-face (non-profit), instructional purposes.

A prominent tax attorney has suggested that a figure of 1-10% of the production costs of a program - or - of the amount paid by the network for the rights to air the program, could serve as the basis of the tax credit. This credit could be specially designated as remuneration for the use of copyrighted works by school institutions. The legislature would have to determine the exact criteria for the tax credit, after hearing testimony from the affected parties. The goal would be to seek the most simple index to facilitate payment to the proprietors and open access by schools to programming of educational value. Congress would also have to determine whether to allow this credit for game shows or soap operas, where educational value would not be as significant.

Of greatest impotance to copyright proprietors would be the guarantee of a fair return in exchange for non-profit educational uses of program materials. Off-air recording has been a widely accepted practice in education for more than 20 years, and no form of royalty has heretofore been provided. The tax credit would create a steady and predictable revenue flow. Once the tax credit was received by the main copyright owner, the other contributors could be reimbursed. Seemingly, the primary copyright registrant would appear to be the most qualified to fairly apportion royalties to the other contributors to the creative effort.

WHY IS THE TAX CREDIT THE BEST SOLUTION TO THE OFF-AIR PROBLEM?

It allows both sides of the controversy to win! Students would be allowed on-going access to educationally valuable resources. Most teachers don't use shows to teach when they are aired – programs are saved until they fit the right teaching moment. The 10 day limit under the current guidelines does not recognize this need. All shows could be retained until their educational value was exhausted with the Public Service Concept. The guidelines require erasure of valuable programs, even if the school cannot buy the show commercially. The Public Service Concept would allow access to the resources of television without regard to the financial status of a school district in which a particular student happens to live. Thus, the concept would provide for great advances in Educational Opportunity. Basic copyright theory does create protection of the right to be paid for creative efforts, but it also creates the equally compelling right of reasonable public access. A representative nationwide study could be conducted prior to final legislative action to determine if there are a significant number of students with no access to educational programs due to economic conditions. To buy one school copy of the Cosmos television series on the universe (already funded in large part with Federal funds), the cost would be $4160. How many schools can afford such an expense? – we need more data in order to fashion a fair compromies.

The Public Service Concept would eliminate the need for additional government agencies to collect and administer copyright royalty monies, and subsequent distributions back to creative artists. It would eliminate the need for government agencies and/or educational production companies to police for off-air violations. What if a school inadvertantly keeps a tape for 65 days instead of 45 days? Will they be sued? Will a government agent come on the campus periodically to check the videotape library? If the Public Service Concept became part of an amendment that passed, the measure would have the full force of law. The low level of legal authority and the tentative nature of the Fair Use guidelines are problem areas within the present structure. It should also be noted that blank tapes are often used by thousands of people for purposes other than recording from the air. Should these applications be taxed?

HOW CAN THE PUBLIC SERVICE CONCEPT BE APPLIED TO THE HOME TAPING PROBLEM?

Seemingly the main thrust of present discussions centers on the search for a fair method of remuneration for copyright owners that also allows for widest public access to TV programs in the home setting. The Tax Credit could be used as the mechanism to pay copyright proprietors when TV shows are privately recorded. The Public Service Tax Credit presents a viable alternative to the presently proposed plans while having a similar end result.

Instead of a direct tax on tape or equipment the tax credit could be allowed. The government would then decide whether to pay the entire cost, or to levy a tax to repay a portion or all of the funds lost via the tax credit. The complex mechanism using the copyright royalty tribunal could be replaced with this more simple and direct instrument (the Public Service Concept). For non- profit educational uses, the author favors the credit with no tax. CONCLUSION: The general decline in funding for education, inadequate funds for effective lobbying, and many other distractions for educators have perhaps not served students as well as possible regarding this issue. These conditions have not allowed adequate time to protest laws that classify school uses of educational materials as public performances the same as are found in Bars and Taverns. We have not been able to successfully combat a law that says a school must pay a royalty if the High School band plays "Rocky" at a half-time ceremony for a local basketball game.

The concept of a "continuing royalty "is gaining momentum. If a royalty is provided, creative artists will be compensated for the recording that is destined to occur. The Doctrine of Fair Use has established that duplication of materials for comment, criticism or scholarship is a privileged use. To limit recording for educational purposes, (as in the Fair Use Guidelines) while allowing recording for home entertainment would seem to directly contradict the historic principle of Fair Use. The royalty proposal did not exist when the Guidelines were written.

Perhaps it should be remembered that were it not for our system of education, many of us hearing this presentation would not be in our present positions. Our future citizens will need all the tools that we can possibly provide. It is my sincere hope that student needs will be recognized in any final actions you take.

SUBMITTED BY:
F. William Troost, Ph.D.
Associate Professor, Los Angeles Trade-Technical College

Chairman, Instructional Media Committee
Los Angeles Community College District

PREPARED STATEMENT OF JERRY MOSS

MY NAME IS JERRY MOSS. I AM CHAIRMAN OF A&M RECORDS, AN INDEPENDENT RECORDING COMPANY, WITH HEADQUARTERS IN LOS ANGELES. THIS STATEMENT IS IN SUPPORT OF AMENDMENT 1333 TO SENATE BILL 1758.

WE CREATED A&M 20 YEARS AGO, BACK IN 1962. MY PARTNER, HERB ALPERT, AND I PUT A COUPLE OF INDEPENDENTLY PRODUCED RECORDINGS TOGETHER WITH 100 DOLLARS CASH FROM EACH OF US AND STARTED A LABEL. THIS REPRESENTED A CAPITAL INVESTMENT OF APPROXIMATELY $1,000. TODAY WE ARE THE FOURTH OR FIFTH LARGEST LABEL IN THE COUNTRY, BASED ON CHART SUCCESS, AND THE LARGEST PRIVATELY-OWNED INDEPENDENT RECORDING ORGANIZATION IN THE WORLD. WE ARE TRULY THE EMBODIMENT OF THE AMERICAN DREAM, IF THERE EVER WAS ONE, AND PROUD TO BE SO.

THE YEARS SINCE 1962 HAVE BEEN GOOD TO US. WE'VE WORKED WITH OUTSTANDING ARTISTS AND MUSICIANS AND HELPED TO CREATE SOME WONDERFUL RECORDINGS. WE'VE BEEN LUCKY AND, WE LIKE TO THINK, WE'VE ALSO DONE GOOD WORK.

OUR SUCCESS IS DUE, IN NO SMALL PART, TO THE PROTECTION PROVIDED BY OUR COPYRIGHT LAWS. WE THANK THE MEMBERS OF THE COMMITTEE FOR YOUR IMPORTANT ROLE IN PROVIDING THIS PROTECTION.

I WISH I WERE AS CONFIDENT ABOUT THE NEXT FEW YEARS. I AM NOT I AM WORRIED. I AM WORRIED BECAUSE OF THE GROWTH OF HOME TAPING. PEOPLE ARE TAPING MORE AND MORE AND BUYING LESS. AND, THAT IS BAD NEWS FOR RECORD-MAKERS, AND BAD FOR THE PUBLIC, AS STAN GORTIKOV EXPLAINED.

THIS IS A VERY RISKY BUSINESS. EIGHTY-FOUR PERCENT OF ALL INDUSTRY RELEASES FAIL TO RECOVER THEIR COSTS. SIX PERCENT OF CLASSICAL RECORDS MAKE IT INTO THE BLACK.

ONLY A FEW OF THE 30,000-40,000 RECORDED SONGS RELEASED EACH YEAR BECOME BIG HITS AND MAKE REAL MONEY. WE RELY ON THOSE OCCASIONAL HITS TO SUBSIDIZE ALL THE OTHERS, TO FINANCE THE NEW ARTISTS AND SONG WRITERS, THE EXPERIMENTAL AND SPECIALTY RECORDS, AND THE TYPES OF MUSIC WHICH ARE POPULAR ONLY WITH SMALL SEGMENTS OF THE PUBLIC, LIKE JAZZ, CLASSICAL, ETHNIC AND GOSPEL.

TAKE ONE OF OUR ALBUMS, SUPERTRAMP'S "LIVE" RECORDING ENTITLED "PARIS". WE SUPPORTED THIS GROUP FOR MANY YEARS BEFORE THEY FINALLY FOUND THEIR AUDIENCE. WE INVESTED CLOSE TO THREE QUARTERS OF A MILLION DOLLARS BEFORE WE FINALLY MADE ANY REAL PROFIT FROM THIS EXCEPTIONAL BAND OF MUSICIANS. HOME TAPING IS DEPRIVING US OF THE MONEY WE NEED TO SEEK OUT THOSE NEW ARTISTS SIMILAR TO THESE AND TO STICK WITH THEM.

HOME TAPING ALSO SIPHONS OFF THE MONEY WE NEED TO PRODUCE GOOD ALBUMS LIKE JOAN ARMATRADING'S "WALK UNDER LADDERS", WHICH A LOT OF PEOPLE LOVED, BUT HAS YET TO BECOME A BIG HIT. THIS IS ONE ARTIST WE PLAN TO STAY WITH UNTIL SHE ATTAINS THE SUCCESS SHE SO RICHLY DESERVES. BUT WE'VE HAD TO PUT AN END TO SUPPORTING A GREAT MANY OTHER ARTISTS WE ENJOYED HAVING RECORD FOR US. WE SIMPLY COULD NO LONGER AFFORD THIS KIND OF SUPPORT.

THROUGHOUT THE INDUSTRY, HOME TAPING IS HURTING THE PEOPLE AND THE COMPANIES WHICH CREATE SOUND RECORDINGS. WHILE OTHER FACTORS MAY CONTRIBUTE, SINCE WE'RE IN A RECESSION, WE ARE STILL CONVINCED THAT HOME TAPING IS THE REAL PROBLEM. WHY? BECAUSE PEOPLE ARE TAPING MORE AND MORE AND THE SURVEYS TELL US THEY TAPE INSTEAD OF BUYING.

PICK UP THE TRADE MAGAZINES OVER THE LAST FEW YEARS AND EVERY WEEK YOU READ ABOUT THE LAYOFFS, PEOPLE WHO WILL PROBABLY NOT BE ABLE TO FIND NEW JOBS IN AN INDUSTRY FOR WHICH THEY MIGHT HAVE TOILED FOR TEN, TWENTY, OR IN SOME CASES, THIRTY YEARS. THE TRADE JOURNALS ARE ALSO FULL OF REPORTS OF CUTBACKS IN ARTIST SIGNINGS, AND PLANS FOR FEWER RELEASES.

PLEASE ALLOW ME TO PRESENT WHAT I BELIEVE TO BE A WORTHWHILE STATISTIC. A PERSONAL BUT RELATIVE ONE...IN DOING SO, I MUST MENTION HERE THE TRADE ASSOCIATION, NARM, THE NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS. THIS ASSOCIATION REPRESENTS PRACTICALLY ALL OF THE OUTLETS BY WHICH OUR RECORDS AND PRE-RECORDED TAPES REACH THE AMERICAN CONSUMER. EACH YEAR, NARM PRESENTS SEVERAL AWARDS FOR DIFFERENT TYPES OF BEST SELLING PRODUCT. A&M HAS BEEN PRIVILEGED TO RECEIVE MANY SUCH AWARDS OVER THE YEARS. BUT I WOULD LIKE TO TAKE THIS OPPORTUNITY TO CALL YOUR ATTENTION TO TWO OF THEM. IN 1976, WE RECEIVED, ON BEHALF OF PETER FRAMPTON, THE NARM AWARD FOR BEST SELLING ALBUM OF THE YEAR, "FRAMPTON COMES ALIVE". THAT YEAR, 1976, WE SHIPPED AND SOLD ALMOST 6.8 MILLION RECORDS AND TAPES OF THAT PARTICULAR RECORDING. IN 1979, WE WERE FORTUNATE ONCE AGAIN TO RECEIVE THE SAME AWARD, BEST SELLING ALBUM OF THE YEAR, FOR SUPERTRAMP'S "BREAKFAST IN AMERICA". SALES WERE A BIT OVER FOUR MILLION UNITS. IN THIS CURRENT YEAR, 1982, WE'RE IN THE MIDST OF DISTRIBUTING ANOTHER "HOT" RECORDING, THE GO-GO'S "BEAUTY AND THE BEAT". WE HAVE JUST FINISHED SPENDING SIX WEEKS AT THE TOP OF THE "BILLBOARD" ALBUM CHART WITH THE GO-GO'S, THE SAME AMOUNT OF TIME SUPERTRAMP HELD THAT SAME SPOT IN 1979. OUR SALES?

WE HAVE NOT YET REACHED ONE MILLION, SEVEN HUNDRED THOUSAND UNITS. BUT THIS RECORDING STILL HAS SOME LIFE, SINCE IT'S STILL NUMBER THREE. AS FAR AS WE AT A&M AND THE RECORDING INDUSTRY ARE CONCERNED, THESE ARE ALARMING STATISTICS. IT IS OBVIOUS THE TOLL THAT HOME TAPING IS TAKING FROM OUR COMPANY'S PROFIT PICTURE AS WELL AS OUR INDUSTRY'S WELL-BEING. WITHOUT PROTECTION OF OUR COPYRIGHTED WORKS, THE FUTURE IS, AS YOU CAN SEE, OMINOUS AT BEST.

ACROSS THE LAND, PEOPLE ARE STILL COLLECTING OUR RECORDS, BUT MORE AND MORE THEY ARE DOING IT BY TAPING, WITHOUT PAYING US, THE COPYRIGHT OWNER. WHEN THEY TAPE INSTEAD, THEY DON'T CONTRIBUTE TO OUR ARTISTS, TO OUR RECORDING COSTS, TOWARD COMPOSER ROYALTIES, TOWARD OUR SALES OR NEEDED PROFITS. THEY MAKE NO INVESTMENT IN THE FUTURE OF THE AMERICAN MUSIC INDUSTRY.

HOME TAPING IS A FACT OF LIFE. WE UNDERSTAND THAT. AND WE ARE NOT ASKING YOU TO TURN BACK THE CLOCK. WE ARE ASKING YOU TO CHANGE THE COPYRIGHT LAW TO KEEP PACE WITH TECHNOLOGY. YOU CAN INITIATE THAT CHANGE. YOU CAN HELP TO INSURE CONTINUED LIFE FOR OUR COPYRIGHT IN THESE ALBUMS PRESENTED HERE TODAY. YOU CAN DO THIS BY MAKING POSSIBLE A REASONABLE ROYALTY, AS CONCEIVED IN THIS LEGISLATION.

AT A&M, WE WILL CONTINUE TO DO OUR BEST TO HELP CREATE AND PRODUCE FINE RECORDINGS FOR THE PUBLIC. WE MUST LOOK TO YOU -- THE MEMBERS OF THE SENATE JUDICIARY COMMITTEE -- AS THE GUARDIANS OF OUR RIGHTS.

APRIL 21, 1982

TESTIMONY FOR FREDERICK ROSA

INDEPENDENT PRODUCER FROM MADISON, WI

Mr. Chairman, I am Frederick Rosa, co-owner of Videotape Industrial Productions, Inc., in Madison, WI. Our firm produces video training programs for businesses in the Madison area and we have a newsletter which we distribute to a list of approximately 500 clients in the Midwest.

We are an independent producer of video programs used to train employees or sell products. Most of our initial work is done on 3/4-inch tape, but we produce between one and 15 copies of our programs on Beta or VHS tape for each of our clients. One client orders 100 copies on these ½-inch tape formats.

I understand your committee is considering the imposition of a royalty fee or tax on home video equipment and blank video tape. This across-the-board tax would be totally unfair for independent producers like myself.

Our company uses between $20,000 and $24,000 worth of ½-inch tape each year. A $2 tax on each of the tapes we use would increase our costs exorbitantly and reduce our business. If the cost of each tape increases, our clients will be inclined to order fewer copies. Decreased volume will result in higher costs to our customer, and those costs will certainly be passed on to consumers. Consumers buying their products or utilizing their service will be the ultimate losers.

-more-

Another inequity of this proposed royalty tax is that it will benefit least those producers who should obtain the additional revenues. Small independent producers like our organization do not have the time or funds to petition for a portion of any fees collected. As a result this tax will do nothing but enrich the twenty-odd multi-billion dollar major motion picture production companies. These companies already realize massive profits from box office receipts, sales to television and from the sale of pre-recorded video cassettes. To add to this plentiful income at the expense of independent producers is a plethora of injustice.

A tax is going to turn off consumers. Americans are opposed to any additional taxes and consumers will be enraged when they realize their tax dollars are being used to collect a tax to benefit big-dollar movie companies.

The practice of home video taping is harmless and no royalty tax on private use could be considered a fair solution. But a tax imposed on independent producers is even more outrageous and is sure to be repeatedly challenged in the courts.

STATEMENT BY RICHARD SOUKUP

OWNER, VIDEO STATION STORES

MADISON, WISCONSIN

Mr. Chairman, I am Richard Soukup, owner of two Video Station stores in Madison, Wisconsin. Our stores deal in both video software and hardware, with approximately 75 percent of our revenue coming from movie rentals and approximately 25 percent of our income derived from video cassette recorder sales.

As a small businessman, whose economic welfare depends on the new market for video products, I am concerned and alarmed by the proposition that a tax, or royalty fee could be added to VCRs and blank video tapes. Such a tax would have a devastating effect on my business and on all small video retailers across the country.

I would like to describe for you my typical customer. I think you will agree that this consumer is not engaged in any activity which could in any way be considered illegal, and is not interested in infringing on copyrights.

Most of my customers who buy a VCR become members of our movie rental club. For $5 they can rent a movie for 3 days to watch in the privacy of their own home on their own time schedule. These people are not recording movies off the air. Why would they want to spend $20 for a blank tape to record a movie with commercials and with signal interference, when they can rent that movie for much less without these impediments?

Mu customers prove that the movie industry's contention that consumers are building libraries and watching home-recorded movies over and over is totally wrong. Instead, my customers want access to a large selection of titles for one-time convenient viewing.

Undoubtedly when a customer first buys a machine, he does some off-the-air taping, but he rarely keeps a permanent copy. He tapes a program for viewing at a more convenient time. Those customers are using the time-shift capacity of their equipment and not making permanent copies. Tapes are just too expensive. Instead, my customers are re-recording, using the same tape until the quality of that tape is no longer good. It is merely a time-delay process. Why should it be legal for customers to see a program at noon and not legal for them to see it when they get home from work at 5?

Within the last year about 20 percent of my hardware customers have purchased portable video cassette recorders and cameras. This is the biggest boom area in the industry and these customers would be the most unfairly penalized by a royalty tax. When a customer buys a portable unit and camera, they plan to use it much like a home movie camera. Instead of using a photo album, they are video recording the memories of their children as they grow up. It is totally unfair to tax these people for a very limited use of these machines.

The movie industry already profits from its product at the box office, from cable television and from the sale of pre-recorded cassettes. In the last couple of years movie studios have released 50 years worth of motion pictures on cassettes. They are realizing new profits from movies which otherwise would have a very limited market - namely independent stations on a Saturday afternoon.

The movie industry is currently in the process of changing its marketing techniques by charging dealers like myself more for their product and by renting instead of selling their product to dealers. These techniques are questionable, and surely add greatly to the movie industry's profits already.

The market for movies is there. The movie industry knows it and has profited from this new video market. A tax would only serve to limit that market and hurt consumers.

May 5, 1982

Senator Charles Mathias, Jr.
c/o Senate Judiciary Committee
Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Mathias:

I am writing on behalf of 419 retailers who are dues paying members of the American Video Association. These retailers sell consumer video products; video recorders, pre-recorded video movies, blank video tape, and video accessories. AVA members are located in all parts of the United States. We provide management, informational, consulting, and buying services to these video dealers, and are very much involved and familiar with all phases of video specialty retailing.

We are very concerned about recent legislative developments, and feel that some of the proposed legislation could be permanently damaging to the businesses of independent video dealers, such as those who comprise our membership.

Most of these retailers started their businesses less than 5 years ago, and many of them opened "video software" oriented retail stores in reponse to the marketing of movies on video tape by the major film studios. Initially the costs per movie were about $35 to $50 each, and the retail prices were about $45 to $75 each. There was significant sales resistance at retail, and consumers continually asked to "rent" the movies. However, most of the movie studios required that video dealers sign an agreement which prohibited movie rentals, and only allowed sales.

As the studios sought wider and wider levels of product distribution they began dealing with video movie distributors, which would service video retailers in a given area. The video movie distributors did not exist previously, and became a third party in the distributive process. Eventually the movie studios lost conrol of their distribution and video dealers began to openly rent movies, which is what the public wanted all along.

Most movie studios "turned their back" to the movie rental problem and sold titles to dealers and/or to distributors with full knowledge that the titles were being rented, rather than sold. The studios did, however, begin to raise their prices until we now find the typical dealer cost of a video movie to be in the $50 to $70 range, which is what was originally the retail sales price. These price increases were undertaken by the studios to give them a larger share of the rental profits.

AVA
AMERICAN VIDEO ASSOCIATION
2634 W. Baseline Road • Mesa • Arizona 85202 • (602) 838-7157 • (800) 528-7400

At the same time that the movie studios were raising the cost of the video movies, there were more and more video software (movie oriented) stores opening, until there are now an estimated 5,000 to 8,000 such outlets, primarily handling pre-recorded video movies. This has created a competitive market condition which has driven the average rental rate for a video movie from $4 to $5 per day down to as little as $1 to $2 per day. During the latter part of 1981 and the first part of 1982 several movie studios decided to implement "lease" programs which would allow them to retain more contnrol over the movies, while generating higher levels of profit for the copyright holders. These lease programs have proven to be unsuccessful in the market, and have failed, due to high costs, excessive paperwork requirements, and dealer resistance.

In addition to handling video movies, most members of the American Video Association also sell video recorders. This remarkable product has achieved higher and higher sales levels each year as the public has learned of the great utility that is offered. However, the competitive market conditions exist and prevail here too. Video recorders are sold at very low margins, frequently as low as 5% to 15% above cost, the same way that we find other consumer electronics, 35mm cameras, televisions, and appliances marketed. (This is very common when a consumer product is brand name and model number identifiable, and when the consumer has access to several different retail sources for the same product.)

Retailers of video products, including pre-recorded video movies and video equipment, do not enjoy satisfactory profit margins. Many industry observers expect a major "shake-out" to take place among video movie distributors and retailers this year, due to the above listed factors of competition and distribution, and due to the overall economic conditions that exist at present.

We clearly favor legislation that would clear up the confusion regarding the right of a consumer to privately videotape a free television program for subsequent viewing. We do not favor, and are very much afraid of, legislation that would increase the cost of video equipment and/or the cost of blank video tapes. These items have many other uses, other than for recording programs from television, and any such charge would be vastly unfair to manufacturers, distributors, retailers, and users of video products. Only the movie studios would benefit from such levies.

We are equally concerned about proposed changes in the copyright law which would eliminate the "right of first sale" doctrine. This will have even more of a lethal effect on the operation of the independent video store, and would unjustifiably alter the present studio/distributor/dealer relationship strictly to the benefit of the movie studios. We anticipate that if this portion of the legislation is passed, many hundreds of video software stores will go out of business due to new and excessive demands and controls from the suppliers of pre-recorded video movies.

As has been previously stated by others, the movie studios have yet to show that any of the present conditions are harming them. The proposed legislative amendment to the "right to tape" legislation would only favor the movie studios, at the expense of others, including the consumers, and particularly including the most defenseless group of all, the independent video dealer.

The fact is that the movie studios have made money from the marketing of movies on video tape. A second fact is that the independent, small video dealer has been the key in this marketing effort because it has been this same, small dealer, who had the courage to take on a product line that was virtually unproven in the marketplace; pre-recorded video movies. Chain stores have held back, and are still not a significant factor in this new industry.

A final fact is that these stores are small, often family oriented, and frequently undercapitalized. They are most subject to uncontrollable changes that may take place, such as will be caused by the amendment to the "right to tape" legislation. We cannot help but see that the independent video dealer will receive no benefit from the amendment that has been introduced, and will suffer greatly from its negative effects on current market conditions.

Respectfully submitted,

John Power
Executive Director
American Video Association

April 21, 1982

STATEMENT OF ERVIN DRAKE
SENATE JUDICIARY COMMITTEE
RE: AMENDMENT NO. 1333 TO S. 1758

My name is Ervin Drake. I am a member of the Executive Committee and, until March 31st, for nine years served as President of the American Guild of Authors and Composers. I am submitting this Statement on behalf of A.G.A.C. and the Nashville Songwriters' Association, International.

We ask you to consider the economic situation of the individual author or composer who has created the work, the value of which is being eroded by home taping. Songs -- not electronic technology -- not vinyl -- not paper -- songs are the basic material of our industry.

We wanted you to know of this first-hand from a songwriter. Because your decision in relation to the practice of home taping will affect not only the lives and livelihoods of individual members of the two organizations I am pleased to represent, but many other unaffiliated songwriters who share our burdens.

Like the record companies, recording artists and publishers, we songwriters also take high risks with our individual creative efforts.

As past President of A.G.A.C. I would like to explain how our organization serves the interests of its membership. Founded some fifty years ago, A.G.A.C. assists songwriters. Our organization collects royalties due from publishers, verifies same for accuracy and conducts periodic audits. Since most of our membership, as well as the majority of songwriters, suffer an income at the poverty level, A.G.A.C. furnishes advice to its members and assists them in their professional careers by conducting workshops and seminars. We serve the needs of the heirs of deceased writers by furnishing them advice of their rights under the 1976 Copyright Law. A.G.A.C. attempts to perform all of these roles to the best of its ability, by charging a modest membership fee and a small percentage of the royalties collected for our members from their music publishers. A.G.A.C. does not collect royalties from our members' performing rights organizations. Thus, the majority of the sums collected by us represent income from the sale of recordings -- which is the business of these hearings.

What makes a songwriter?

I believe I can qualify as a somewhat representative songwriter.

I began writing songs in 1931 at the age of 12. It took me approximately 12 years to secure my first hit song entitled "Tico Tico." In the succeeding 35 years I wrote well over 600 songs, including: "I Believe," "It Was A Very Good Year," "Al Di La," "Good Morning Heartache," "A Room Without Windows," "Perdido," "Across The Wide Missouri," "Come To The Mardi Gras," "The Rickety Rickshaw Man," "Sonata," "Father of Girls," "Made for Each Other," "My Friend" and "Beloved Be Faithful" . . . every one a "top forty hit" or its equivalent at the time.

To this day I continue to write both individual songs and songs which hopefully will be heard in a Broadway theatre. In the late 1940's and early 1950's, and notwithstanding my several hit songs, I soon realized that the monetary return was far more modest than I had expected. This required me to accept full-time employment as a producer in prime-time radio and television in order to augment my income. However, I did not cease functioning as a producer/writer and fortunately, in the mid-1960's with my broadway success "What Makes Sammy Run" it was possible for me to return to full-time songwriting.

Our problems as individuals were detailed in a survey which was undertaken by a leading firm of economists, Rinfret Associates, Inc. It was the first comprehensive creative, financial and sociological profile of American songwriters.

What emerges from The Rinfret Survey is not dissimilar to a writer like myself who, during his or her lifetime, will compose between 500 and 750 songs and if lucky will achieve success in 2% of one's total output. The survey found that songwriters are engaged in a "high risk-low reward" profession.

The music community constitutes a kind of cultural "food chain" -- the ultimate beneficiary of which is the public. The chain begins with the creator. That is the songwriter who provides the material to be prepared in tempting and delicious form for the public. The songwriter brings his new offering to the publisher, who exercises his several important functions: he audits the work and criticizes it, sometimes requesting changes. When he is satisfied, he brings it to the record company, where it goes through a similar process and, if approved, is given to a record producer. He considers its usefulness for any number of artists he serves. Then the artist must approve the work. Ultimately it reaches the record merchandiser, the shopkeeper who services the general public. Each one of these individuals is an important link in the music business "food chain." Every one of the links of that chain is damaged when a sale is displaced because of home taping. But I would like to focus on two of the victims of home taping, in particular: the songwriter and the public.

Allow me for the moment to step out of my role as representative of 6000 songwriters. Instead, I would point to the plight of any one songwriter whose small number of surviving songs is decimated by home taping. That songwriter can never make up that loss no matter how many records of his contemporaries may be sold. Multiply this by 6000 and you view a brutally bleak landscape.

You see, the songwriter does not enter his chosen field because of dreams of dollars dancing before his eyes. He writes because he has to. It is his life. There is none other. If they take away his avenue of communication with the public, he has little to contemplate but the title of a song from the film "M.A.S.H.": "Suicide is Painless."

For now and the foreseeable future, the record is the basic medium of communication between the songwriter and the public. As for that public, since there are so many more of them than there are songwriters, they shall be the mass victim of their own home taping. For, once they drive the providers of recorded music out of business, who will furnish them the new prototype to tape? They will be reduced to playing their old tapes over and over and over. . . . We all know too well the story of the goose that laid the golden egg. It is one of Mother Goose's tales of horror and none know that story better than the tapers who are right now killing the fabulous goose. When the manufacturers hand the public a license to record at home -- which is what the marvelous new "hardware" amounts to -- and when they encourage citizens to simply help themselves to all the goodies they want without payment for the goodies, the final achievement of the licensors will be more than just the bankruptcy of a major industrial art form; for not only will tens of thousands of employees of record companies be thrown out of work, not only will countless publishers be forced out of business, not only will the sound of the artist be limited to TV and public encounter, not only will the songwriter tie a noose around his neck, not only will there be no new records to tape -- no, one more thing shall be added to this disaster: the innocent public will have been made an accessory to the destruction of four industries.

I believe there is a remedy for this sick situation. I believe that the avenue to this remedy is a way that the Congress can point out to all. For, most of all, I believe in the Congress of this nation. I believe in the Congress that passed the Copyright Act of 1976. I do *not* believe that the Congress will mutilate its own fine work by underwriting any activity that will tend to destroy the intent of not only the 1976 Congress but of the Constitutional Convention that guaranteed protection to the artistic creators of the Republic. I do *not* believe that this Committee of the Senate gives with one hand only to remove with the other.

Please grant our industry a royalty. As a songwriter, that is something I well understand because I do not *sell* my work. *I lease it for definite periods of time* and *under specific terms of use*. You see, when someone buys a recording, that purchaser buys a physical entity -- the underlying rights remain with the copyright owner. Songwriters are compensated only after there is a use that is paid for.

And now, with your indulgence, I would like to quote a bit of homespun philosophy as expressed by one of our leading Nashville songwriters. It is terribly pertinent to the subject. He said, "You've got to put the ointment where the itch is." And so, to apply that ointment judiciously, I respectfully request that you grant our industry a royalty to be paid by the makers of blank cassettes and taping devices.

Thank you.

Consumer Recording Rights Committee

1825 K St., NW
Suite 210
Washington, DC 20006
(202) 466-3003

STATEMENT OF ROBERT J. McEWEN, S.J.

As past president of the Association of Massachusetts Consumers, I want to go on record as supporting S. 1758 to remove copyright infringement charges from consumers who tape material for their personal, non-commercial use in the home. I want to emphasize the fact that there should be a total exemption from any charges of copyright infringement for consumers using taping equipment for their own personal private enjoyment or convenience in their homes, not merely the assurance of no prosecutions or penalties.

A resolution was adopted by the Board of Directors of the Association of Massachusetts Consumers asking for such an exemption and, representing the Association, I presented a similar resolution to the annual meeting of the Consumer Federation of America (CFA) which met here in Washington in January of 1982. That resolution supporting Congressional action for total exemption of private in-home, non-commercial use of recorders without charge of copyright infringement was unanimously adopted by the annual meeting of the CFA.

I urge you to consider the following reasons for these actions.

1. This is a period in which we are witnessing presidential and congressional drives to "get the government off the backs of citizens and business", indeed a period when that drive is in high gear. There are many worthwhile social and consumer programs that have been slashed in the name of free market solutions to business problems. I find it ironical and strange that Congress is now considering, in the videorecorder issue, more government on the backs of small business and on consumers using videorecording devices in their own homes.

   I find, therefore, that the Mathias bill, which aims to involve the government deeply in royalty setting and collection practices for the benefit of one part of the entertainment industry, is totally unjustified.

2. We view the use of a video cassette recorder not as a "reproduction" of any copyrighted work as much as a "re-reception" of a work produced and distributed by somebody else. This device merely allows the consumer to delay his reception and enjoyment of a program sent over the public airwaves by the producer. I fear that we have strained the language and meaning of copyright protection when we define the delayed reception of a program as the equivalent of the reproduction of the program. The so-called time-shifting argument, therefore, has enormous pertinence and compelling power in this debate.

3. Our contention is that any payments that are warranted should be worked out by the producers and distributors of programs before they are sent into the public domain.

4. The argument of the movie industry regarding possible future harm if home viewers erase or skip commercials is particularly off target. If it ever becomes unprofitable for the movie industry to continue to sell to TV, that is a marketplace decision. It has nothing to do with copyright issues. Demanding royalties on this ground is a hoax on the American public. Perhaps the next step is legislation to require people to look at all commercials as they sit at their TV.

5. I want to call attention to the fact that consumers have not been adequately represented in the discussions and the hearings conducted so far by Congress. I have taken the lead in forming a national voluntary committee of consumer leaders to support total exemption of home videotaping from copyright infringement. A copy of our letter to consumers is attached and I request that it be made part of the record.

   I also want to assure you that the statements presented to Congress by the National Citizens Committee for Broadcasting do not represent our Association's position, or my position as a dues-paying, subscribing member of the National Citizens Committee for Broadcasting.

I suggest to you that the desire to right every wrong in the public economy can lead to an interventionist approach that demands too much of the public law and the government. I think the particular copyright proposals pertaining to private in-home uses of new technical machines and developments are a prime case in point. This is not an area that the government can effectively or efficiently enter. Therefore, our position is that the royalty tax plan should be abandonned by this committee and Congress and a simple exemption of private non-commercial taping be enacted.

Consumer Recording Rights Committee

1825 K St., NW
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February 18, 1982

Dear Friends:

When the courts ruled in the now famous "Betamax" case that videotaping from home TV sets was illegal, there was an immediate response. The decision was met with ridicule and disbelief all over the country. Many people see the decision as a privacy issue, but we believe it is a consumer issue of real importance.

Currently, there are two bills in Congress to make private, non-commercial videotaping legal. But another backed by the Motion Picture Association of America requires a royalty tax, and this bill is gaining momentum. The movie industry realizes that it will be an invasion of privacy to monitor individuals to determine if they are actually violating the copyright laws. Instead, the industry seeks a universal penalty -- royalty taxes that would be levied on every set and every blank tape manufactured.

More than 3.5 million Americans own video cassette recorders and cameras. Their primary uses are to control the time at which they watch a TV program, or to videotape with their camera home movies and other items of personal importance to them which in no way infringe on copyright. Studies have shown most Americans are not interested in building a movie library -- the cost of blank tapes makes it impractical. An additional tax on these tapes and recorders would keep more consumers from owning this equipment. These consumers would be taxed indiscriminately and unjustly to enrich the movie industry. Video recorders and cameras are still a luxury for many, but the 3.5 million sets sold represent 10 million people, and that number is expected to triple in the next three years.

We believe the consumers must be heard on this unjust levy, and we need your support in this effort. We are working with the Home Recording Rights Coalition to get legislation protecting our common interest with small business and retailers, suppliers, and manufacturers. We want Congress to know this is a common concern shared by people all over the country.

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We plan, also, to file an amicus curiae, or "friend of the court", brief before the Supreme Court on behalf of the consumer interest in this case. If you would like to join with us, as signatories of the brief, please indicate on the attached card.

We hope you will join with us. The enclosed information tells how you can help.

Thank you,

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CONSUMER ACTIVISTS AND CONSUMER GROUPS
WHO SUPPORT S. 1758

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TRANSCRIPTION OF REMARKS BY MARK GREEN
AUTHOR AND PUBLIC INTEREST LAWYER
BEFORE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
FOLLOWING A DEBATE BETWEEN CHARLES FERRIS AND JACK VALENTI

I was invited here, I guess, because I have been a consumer advocate. We'll have another day's session to define that virtuous phrase. But I came here today because I'm a consumer of the product at issue and of the issue. This New Year's Eve my wife, daughter and I went to a local Video Shack and rented for $7, "When Worlds Collide"--it was actually one of my favorite films growing up. We then watched the film on my brother's Betamax--I'm not one of those upscale people who can yet afford a Betamax. Listening to the debate between Messrs. Valenti and Ferris I'm reminded of the title of the film that I saw that night.

I'm here also, in part, because I'm an author. I make my living, such as it is, by writing, and so I want to be good to the copyright laws since they have been good to me. Finally, I am new to the subject. I haven't worked on it due either to belief or retainer, as our earlier speakers, so I lack any of the biases, prejudices, or perhaps knowledge of the first two speakers. But let me pass on the few impressions that I have.

- First, it's a subject that should inspire some humility in speakers and in the audience. The District Court in the SONY case, applying the standard test for fair use exemption to copyright--that is, is it a non-commercial use, what's the nature of the work, how much of the product is being used?--concluded that it was a fair use exemption of the copyright monopoly for home viewers to videotape. The Court of Appeals, applying the same test, issued a reasoned opinion, added just one word--"not". It was not a fair use exemption. No lawyer or other person involved in this process could say with any confidence whether the Supreme Court will grant certiorari and then if it does what its final decision will be. It is by definition, an issue on which reasonable people can differ. The skill of our first two advocates, however, indicated that anyone who held the opposite point of view is a fool. That's the definition of a good speaker.

The first two speakers have little in common--they even disagree on the name of the product at issue; to motion picture people it's VTR, to the electronics people it's VCR--but let me try and sketch out a couple of points that I think we all share. The consumer's major interest is in a diversity of quality programming.

Second, consumers should want to retain a copyright system intact so that artists are spiritually, and financially motivated to produce artistic works and that producers and distributors have the economic movitation to distribute it. That is, no one benefits if you kill the goose that lays the golden egg.

The third, I think the two prior speakers would agree that no one really favors a ban on the manufacture and distribution of VCRs and tapes. The appeals court in the "Sony" case was obviously unhappy when it remanded that any remedy would include a ban. We've had an experience in this country with the Eighteenth Amendment. If you have a product people want--and people don't want VCRs yet as much as they want liquor--people will get it. It's called bootlegging. And any kind of product ban obviously is unenforceable and violative of privacy in the home.

Finally both economic parties at interest seem to agree that some legislation is necessary to avoid the ban or prospect. But I would hesitate before Congress legislates what is called the Mathias Bill. Senator DeConcini and Congressman Paris have introduced a bill which basically was one line long. You can tape off the air for private, non-commercial use. Senator Mathias has introduced a bill in the nature of an amendment which says you can do it, but the Copyright Tribunal will have to impose, after due process hearings, some tax on tapes or machines to compensate copyright holders. But before Congress should legislate the latter, I think it really needs a lot more information. First, it is an instant industry, in a sense. One can see the trendline that probably in X number of years there will be Y number of more machines. Only 3 Million homes out of 60 million homes now have it. I'm apprehensive that Congress impose itself with such a new growing technology. We've seen how lousy government regulation can be in the economic regulatory area. Look at the Interstate Commerce Commission and the way they didn't like more efficient boxcars because the railroad companies didn't like them. Look at, pre-Charlie Ferris, the FCC and how they throttled the cable industry because television didn't like it. So one should intervene warily when you're dealing with such a new technology.

There are big and different numbers being thrown around in this debate. There is a significant difference if you think that 80-90% of the use of VCRs is merely for time-shifting or for libray-building. I heard conflicting numbers today. I don't know the answers sitting here. This may be an area where an Office of Technology Assessment, created by Congress, perhaps should do its own independent study without any kind of economic interest, so that its results, like Congressional Budget Office results, will have more credibility.

We should also learn from the experience abroad more than we have. There are three or four countries which do have a kind of a copyright tribunal approach -- West Germany at the longest, a couple of others more recently. Two to three dozen nations permit taping off the air without imposing any kind of fee. What's been the result of that? Have artists there hesitated to market their product. Maybe they've gone abroad to countries which do impose a copyright fee? I don't know the answer to that. I think before Congress quickly legislates in this area, under the pressure of the SONY decision, a lot more needs to be known than we confidently know now.

I've read some of the materials on both sides of the issue. Motion picture people say that you've got to be careful here because six of ten movies fail and if you reduce the prospect of commercial gain we may have either more failures or even more movies. Yet even a higher percentage of books never earn back their advance. Still, movies are made and books are written. And the reason obviously is that there is the hope of large gain. That is, you may think that a majority don't earn back their advance but we're all hoping for a gusher. The odds against success may be high but so can be the return. So that statistic alone is not persuasive.

Copyright owners and the motion picture people seem to be emphasizing, understandably, the way they could be economically disadvantaged by mass marketing of VCRs. But they don't talk much about the ways they have obviously benefitted by this new technology. First, though different studies contrast with each other, it seems likely that time-shifting is the most dominant reason now for buying into this new device. That may change over time. And if it does, perhaps Congress could act. But if time-shifting is the dominant mode, clearly it enlarges the audience for movies and commercials. And if it does, any artist, movie producer, or production company who doesn't change more for the privilege of a larger audience is pretty economically unintelligent. Second, is there going to be extensive libraries going to be built up of many tapes? I would think it unlikely, but maybe I'm not a typical consumer.

We all buy albums and listen to them repetitively. For some reason we can listen to an album frequently but we don't watch a movie ten times. In terms of commercial and cultural tastes in this country, I can't understand why a large body of people would spend the $14 to $20 for a blank tape to tape to see a a movie repetitively, when they can rent it as I did -- for $7. Of course I paid that on the Upper East Side of Manhattan. There they don't have video stores, they have video boutiques and designer tapes. Perhaps it costs even less elsewhere.

And third, Jack Valenti mentioned the potentially real problem of killing commercials, or editing them out with a switch. But when you're watching commercials on over-the-air television, it's also easy to stand up, walk out, get an orange, talk to your spouse. I don't know how much more likely it will be that people who own a videocassette recorder will "kill" the commercials which pay the freight. But until that answer is quite clear, I would urge Congress not to plunge into regulating what could be a market oriented system. In other words, it could be that the motion picture people get the enormous benefit of the new market called pre-recorded tapes and get the enormous benefit of a wider audience watching their product, which they should charge for when they originally negotiate to sell their product.

Yes, if you own a product you have the right to withhold it from the market or to sell it. But do you have the right to sell it, and resell it, and resell it?

Let me make an analogy to books. It is conceivable to pass a law that only the person buying a book can read it. And when they're done reading it, they have to hand it back. This would permit the people who write the books and sell books to charge each person reading it, each time they buy it. This might indeed maximize profits, but it would limit the information dissemination in society. Now you can argue and say that with VCRs you are reproducing the product which may be literally true, but still misleading. The only way to pass on a movie is to reproduce it by your machine. Once you want to sell a book, as an author, you should seek as large an advance as possible; you should charge a lot for it because as a publisher, once you distribute it into commercial flow in this country, it's gone. It may be passed on to no one, it may be passed on to dozens of people, who will then not buy that book. Ditto if you sell a movie over the air and to potentially 60 million homes: it's gone. You should charge up front for it. And I don't blame people who own a product to try to get the genie back and charge again and again and again. But I think it's unwieldy and it discourages information flow.

A second analogy is the 1971 Congress, which said that it was a fair use exemption to tape sound off television or radio. Well, it seems to me pretty similar if you're going to be able to tape sound off these machines in the home, why not video? I'm sure a terrific lawyer could come up with twelve plausible distinctions on the difference between sound and vision. But I just don't know that they would be distinctions with a difference in terms of what should be fair use exemption and what should be not.

Another analogy is teachers and taping. I think it's fairly accepted that if you're a bona fide teacher and you want to time-shift--i.e., tape a show for your classroom--that's a fair use exemption to the copyright monopoly. But is that really so different than a person in their home taping it, again, for private non-commercial use?

Each of course could hurt the commercial market for that product. That is, if you force the teacher to buy it each time, you can make more money; indeed schools have an economic base to draw upon. They can pass the cost on to taxpayers. You might argue that students are learning something educational. Well, I don't know about you, but when I see films I'm always learning something. I mean it may not be math, but I saw REDS a month ago, I learned something. I also saw SHOOT THE MOON and learned something about my marriage. I think it's difficult to argue that teachers' tapings are a fair use exemption but private citizens non-commercially in the home are not.

Next, the issue of the tribunal. We've all seen how at times, especially when the regulatory agencies appeared in the 1930's a Congress which couldn't define what they wanted done would delegate authority to agencies which should regulate "in the public interest". That's a rather amorphous phrase. Similarly, the proposals made by Senator Mathias run the risk of tossing a hot grenade to a copyright tribunal without standards, which is already years behind in doing what it has already been assigned to do and whose decisions because they affect large economic interest, are invariably appealed to the courts.

In a sense it seems like a nice solution to bounce it to a copyright tribunal to impose some kind of fee. And the SONY appeals court hinted that might be the ideal remedy. But it's not that simple. One of the motion picture people have argued that such a fee will not lead to higher prices. Come on. When you add a cost to selling a product, as substantial as perhaps you mentioned, $50 a VCR, there is a nice chance in a competitive market that that will be passed along to the consumer. In fact, businesses that are regulated or taxed by government invariably argue, well, you're not taxing us. Because we're going to have to pass it on to the poor consumer. So I don't think that argument is terribly persuasive. It is argued also that it's unconstitutional theft to reproduce this product without the copyrighter's permission. Well, that's a conclusion, not an argument. One could also have said that the first time the fair use doctrine was attempted. In fact, I'm sure a lot of the movie people, pre-Jack Valenti, said that television was theft, or that cable was theft early on. Because they were destabilizing technologies to movie producers and exhibitors. They've learned to live with those technologies. There may be fewer people in movie theaters, but movie producers made up for any economic loss there by charging for the showing of their film on cable or over-the-air television.

Let me offer a tentative conclusion. Instead of urging a federal bureaucracy to intervene in this market economy and establish a fee, without a hell of a lot of criteria now, let the market economy work. Let the people who produce these products and the consumers who want to view them negotiate a fair price, with the middle person being the cable firm or broadcaster.

The fact is, until more studies are done which can impeach this conclusion, arms length negotiation is preferable to government regulation. I think it's viable for the copyright owners to negotiate with the people who distribute their product, knowing that more people are watching the product because of VCRs and discounting for people who kill the commercials with existing technologies and if CBS doesn't want to pay you what you want, go to CNN; if CNN doesn't want to pay you what you want, go to PBS. Let the market decide, rather than imposing a tax on consumers who think they've already paid for it when they're paying their monthly rate or renting pre-recorded tapes.

STATEMENT OF PFIZER INC.

The "Betamax Case" is certainly the most famous and one of the most important copyright cases ever decided. In holding non-commercial home recording of television programs to be a violation of the copyright laws, the Ninth Circuit Court of Appeals has reached into the privacy of millions of homes, producing consequences that will unnecessarily interfere with the public's enjoyment of a significant technological achievement, and threatening a vigorous segment of the national economy.

The interest of Pfizer Inc. arises out of its production and sale of magnetic particles used in the manufacture of electronic recording tapes, including videotapes. Because of its technological expertise in this area, and the tape manufacturing industry's acceptance of Pfizer's products, Pfizer has found this business segment sufficiently attractive to justify the investment, over the past three years, of more than $80 million in construction of new and expanded production facilities in Easton, Pennsylvania, Valparaiso, Indiana, and East St. Louis, Illinois. At a time when the national average unemployment is 9%, these facilities employ more than 350 workers in locations suffering even greater recession. Unemployment exceeds 11% in Easton and 14% in Valparaiso, and in East St. Louis, Pfizer is the last major employer still in business.

The VTR industry has grown rapidly and has won wide public acceptance because its principal use, time-shifting, allows the viewing public far greater freedom and flexibility in gaining access to information and entertainment, and because VTR equipment can be used in many additional applications. Which of these uses television viewers use videotapes made with Pfizer's components for--time-shifting, archiving, home movies, pretrial testimony--is immaterial to Pfizer and something over which it has no control. What does concern Pfizer, however, is the very real possibility that unless something is done legislatively it might be forced to stand by, helpless and entirely innocent, while the Betamax lawsuit, involving a small number of parties, representing narrow industry segments, involving no proven claims of injury, threatens to produce economic disruptions extending to Pfizer and to thousands of workers throughout the nation and the world.

Pfizer's interest is in defending its investment, and we therefore urge Congress to amend the "fair use" section of the Copyright Act, 17 U.S.C. §107, in order to give the law the flexibility intended by Congress when the 1976 Act was passed, and in order to promote the goals intended by the Constitution. Otherwise, the law may be interpreted by the courts in a theoretical and unbending way that exalts the letter over the spirit, causing unnecessary and unintended harm.

Universal and other producers of copyrighted television programs, claim that all off-the-air recording of their programs constitutes a violation of their copyrights, for which they are entitled to redress. Their evidence at the trial of the Betamax case showed no actual injury, but they have urged, nonetheless, that they are entitled to an injunction prohibiting all arguably infringing home recording or to statutory damages or an accounting of VTR manufacturers' profits. Any of these remedies could have a severe impact on the VTR industry, and would seriously affect Pfizer and many other related or dependent businesses. They would also leave millions of consumers with expensive equipment that they can use only by breaking the law or by bearing the burden of the motion picture industry's royalty tax, even if the equipment is used in ways that clearly do not infringe anyone's copyright.

Because the individuals who are actually involved in recording copyrighted television programming (or in the many other, clearly non-infringing uses of VTR equipment) are not readily identifiable or susceptible to infringement suits without enormous expense and massive invasions of privacy, the program producers have set their sights on the more compact target of the manufacturers, sellers and advertisers of VTR equipment, charging them with contributory infringement.*

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* Another lawsuit against most of the other videotape and VTR equipment manufacturers and advertisers is now pending in the District Court. Universal City Studios, Inc. v. RCA Corporation, et al., 81 Civ. 5723 (C.D. Cal., filed November 6, 1981).

The program producers' arguments are far from persuasive. In spite of the fact that they have suffered no damage--indeed they have apparently prospered as never before since the advent of the VTR era--they argue nonetheless that home video recording does inflict at least a theoretical injury--that time-shifting, recording a program for viewing at a later time, would preempt the viewing of a later program; that archiving will result in smaller audiences for broadcast reruns, which will in turn reduce advertising revenues, and thus lower the prices program producers can command for copyrighted programming; and that archiving will also result in smaller audiences for later theater revivals of recorded broadcast films.

The district court in the Betamax case made extensive findings of fact, concluding, as the Congress should also, that the first argument is illogical and just plain wrong; the second is contradicted by the producers' own trial evidence; and the third is entirely speculative. Because of the lack of proof of any injury actually suffered by the producers, the impossibility of equitable enforcement as against those who are actually recording off the air, and the drastic economic and social consequences of squelching an entire industry, the Congress should act to assure that non-commercial home recording is recognized as a fair use of the recorded materials.

The alternative is to do what the Ninth Circuit Court of Appeals did--ignore the program producers' lack of any injury;

overlook the drastic social and economic consequences of the court decision; abandon the Congress' earlier intent to provide a broad and flexible fair use exemption; and retreat from the policy of the Copyright Clause to promote the progress of science and the useful arts.

The issue presents, in the most dramatic way conceivable, the collision between the "irresistible force" of technological progress and the "immovable object" of the literal language of the Copyright Act. Failure of the Congress to exempt non-commercial home copying from regulation, will leave in effect a decision that so narrows the definition of fair use as to suppress the primary goal of the Copyright Clause to promote the "progress of science and useful arts" in the form of VTR technology. The decision will grant to the program producers and other copyright owners a control over their works greater than necessary to the same progress in the form of their programs, and an unneeded and undeserved remedy that will do the maximum harm to the VTR industry and the public, while redressing no actual injury.

Monopolies were no more favored at the time the Constitution was drafted than they are today. The Copyright Clause permits the Congress to act in spite of that disfavor in order to encourage the arts and sciences where such an incentive may be deemed necessary. But Congressional power to grant a monopoly should not give rise to an unlimited corresponding right in authors and inventors to maintain or to profit from such a grant at the expense of the public values that are the primary focus of the Constitutional authority. Rather, the monopoly is at all times subject to those public values, especially in a case such as this one in which public benefit flowing from VTR technology far outweighs any impairment of copyright owners' property rights.

The program producers have profited notwithstanding the spread of VTRs; indeed, recording for time-shifting, which all parties' trial evidence showed to be the principal use of VTRs, actually confers a benefit on the copyright owners in the form of a wider audience for their programming (and accompanying advertisements) than would otherwise be the case. The real economics of television programming and viewing should not be obscured by the interposition of the network broadcaster between the program producer and the viewing public. The public pays for its access to copyrighted programming in the form of higher prices for the goods advertised on the broadcasting networks that purchase the producers' copyrighted productions.

The drastic effects of the remedies sought by the program producers and suggested by the Court of Appeals take no account of the many uses of VTR technology that cannot be claimed to be infringing--including numerous forms of clearly non-infringing off-the-air recording--that would also be eliminated along with the non-commercial home recording at issue here. This overkill results from the producers' having taken aim at the VTR manufacturers, rather than at the individual users of VTR equipment.

This strategy necessarily includes the baby along with the bath water and demonstrates the impossibility of enforcing the law fairly in the way the program producers have urged.

What the producers overlook is that both non-commercial home recording and all of the other, non-infringing uses for video recording technology, themselves represent the "progress of science and the useful arts," which the Constitution seeks to promote. The public good to be derived from this progress is threatened by the Court of Appeals' decision; whereas the aspect of such progress represented by program producers' copyrighted television programming is neither threatened nor impaired by non-commercial home video recording. One form of progress of science and the useful arts ought not to be sacrificed to another by imposition of a destructive remedy when both could flourish.

Videotape recording is a new technology that threatens, not for the first time in history, to propel events and relationships far ahead of the development of the law. In drafting the 1976 Copyright Revision Act, Congress made some advance provision for the problem of statutory obsolescence. But even the "now known or later developed" formula (*e.g.*, §§101, 102) is insufficient to resolve all of the issues raised by the rapidly widening division between full protection of the rights of copyright owners secured in Section 106, and the technologically expanded rights, desires, and capabilities of individual members of the public for access to information and works of art.

An established industry that answers the needs and desires of the public and of the Constitution, as exercised in the privacy of individual homes, without the least demonstrated harm to copyright owners, cannot be taxed without gross inequity; cannot be policed without drastic invasions of privacy; and cannot be prohibited without massive and unnecessary economic disruptions.

We therefore respectfully urge that a prompt and straightforward legislative remedy be enacted to assure that non-commercial home recording of television programs is left unregulated and untaxed.

Pfizer Inc.

TRAINING MEDIA DISTRIBUTORS ASSOCIATION

POSITION PAPER ON SENATE AMENDMENT 1333 to S 1758

The Training Media Distributors Association (TMDA) represents 25 organizations - mostly small businesses - importantly involved in the producing and distributing of several thousand standardized audio-visual training programs - primarily motion pictures - for use by business, industry, government, and education throughout the world.

Every major organization in the United States depends to some degree on TMDA members' programs. We are today playing an essential role in achieving the productivity goals which are so important to American industry, government, and individuals.

Today our programs are helping organizations like General Motors, Chrysler, U.S. Steel, and, literally, thousands of others upgrade management and the skills of their workers. We are training millions of workers in Government Agencies, the Armed Forces, hospitals, stores, offices, and factories throughout our land in everything from computer operations, management training, and foodservice to sales, motivation, and health care. Our members have literally thousands of programs on virtually every important area of human endeavor. And, we have invested tens of millions of dollars in the future of the training media industry.

In the past our members sold or rented copies of their programs in the so-called "non-theatrical market" to customers who exhibit them by direct projection in their own organizations. But, we see a different scenario in the future - one which involves the additional, secondary activity of televising important educational and training programs into American homes where people - both adolescent and adult - will receive individualized instruction on important subjects relating to their work and health under highly efficient and economical circumstances.

We believe that the growth of cable systems and low-power television broadcasting stations will offer us an unparalleled opportunity to reach select audiences with highly-specialized interests. We foresee a time when training and education - which today takes place on the job or in the school - will take place in the home. We foresee a time when we can bring valuable instructional knowledge to shutins, the housewife and mother attempting to develop skills for the world of work, students, senior citizens, and workers with little time to go to school after a hard day at the office, all of whom want a better, more rewarding life, all of which they can be helped to attain through the use of our members' programs.

A growing number of our members' programs are already being used as informational programming for broadcasting, and we see this activity as essential for our industry's future economic health. We are therefore vitally concerned with the issue of off-the-air video taping in the home, its proper control, and proper compensation for copyright owners.

Our members generally agree that the permanent availability of their programs in the home once broadcast and taped will adversely affect the market for the sale and rental of copies both to organizations and to the home video market. Home video taping will also diminish potentiality for future television reruns. All of this must be considered along with our experience which indicates that the receipts from television broadcasting of our programs will fall far short of our production costs. We must therefore continue to look to other sources of revenue such as the non-theatrical market and royalty income.

We recognize that home video recording is a technological reality we must accept and work with creatively and positively. We only ask that legislation legalizing this activity do two things: first, institute a reasonable method to compensate copyright owners and, second, be strictly limited to private use of the copies.

It is our position that any law which would authorize the free, uncontrolled off-the-air taping of our members' programs in a school, factory, office or home environment would be tantamount to the legalization of theft and the destruction of our small but vital industry. It is not inconceivable that dozens of offices in an organization could easily be equipped with inexpensive video recorders in such a way that massive copying of any TMDA member's program could take place. Many individual businesses already possess hundreds of videocassette player-recorders.

After careful study, our Board of Directors has concluded that H.R. 5705 - the Edwards Bill - and Amendment 1333 to S 1758 - the Mathias, Baker, Byrd Amendment - meet our criteria for a proper approach to off-the-air video taping in the home. Their scope is confined to home use only, and they provide for a practical, compulsory royalty approach. We shall, of course, continue to be concerned - should these measures become law - that the ultimate royalty formula reflects just compensation for the use of works belonging to our members.

We also support the provisions in these measures which permit copyright owners to control the rental, lease, or lending of copies of their works. The free market isn't working efficiently or effectively to accomplish this necessary end; restrictions are currently built into cumbersome written agreements which interfere with the smooth transaction of daily business.

H.R. 5705 recognizes that rental, lease, and lending are rights which must be reserved to copyright owners to prevent undue exploitation.

There are many horror stories concerning the unauthorized subdistribution of our programs. Here's an example: A TMDA member company produces a very valuable training program. The audience for it is highly limited. There might be a thousand potential customers for it in the entire country. Copies are sold to an organization - ostensibly for the purpose of internal training. Later the organization decides to rent or loan out the program for either direct or indirect gain. By advertising, the organization soon reaches a significant percentage of the producer's potential market. It has taken no risk, spent no development money, and may already have derived full value from the program by utilizing it for internal training. Unbelievable - not at all. Most training media distributors live with the constant threat of this possibility and have had to contend with it on numerous occasions.

The members of the Training Media Distributors Association wish to emphasize that an important group of producers/ distributors - those who make training media - are not "big" business and are not involved in the "entertainment" business. They utilize the techniques of Hollywood, to be sure, but the results of their work are to serve the more serious needs of our society. Weakening laws by making "straw men" out of the entertainment industry can only result in severely damaging the specialized copyright owners who are members of the Training Media Distributors Association.

We respectfully submit that H.R. 5707 and Amendment 1333 to S 1758 strike a proper balance between the needs of copyright owners - including TMDA members - and a public armed with tremendous technological power within the home. We encourage the support of these measures and look forward to answering your questions.

Thank you.

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THE CASE
FOR
HOME RECORDING RIGHTS

HOME RECORDING RIGHTS COALITION
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Private, non-commercial use of video cassette recorders (VCR's) for recording of televised copyrighted material has been held to be illegal in the Sony case. VCR owners, manufacturers, retailers, and advertising agencies were all held liable.

Over 3 million VCR owners are justifiably worried that enforcement of this decision will jeopardize their right to privacy and restrict their home VCR use or make it prohibitively expensive.

The VCR industry is concerned that broad copyright infringement liability and royalty taxes will severely hurt their companies and workers, retailers, consumers, and the future of video technology.

- The VCR has revolutionized home communications by letting people watch shows at their own convenience ("time shifting") and by opening up new uses for audio-visual recording equipment, such as for instruction and home movies. VCR ownership is expected to triple in the next three years.

- Copyright holders are already generously compensated for the televising of their works. VCR use is counted by Arbitron and Nielson viewer rating services in determining a program's value to broadcasters and advertisers. Any additional tax or royalty would be a windfall profit for Hollywood producers.

- Coypright royalty proposals would remove compensation determinations from a functioning marketplace to a federal agency that, according to Government Accounting Office, is structurally incapable of fulfilling even its current tasks.

- Government mandated royalty taxes would add significantly to the cost of recorders and tapes, stunting the growth of this new retailing and manufacturing industry and threatening the very existance of the nearly 5,000 small businesses in it.

Several bills have been introduced (S.1758, H.R. 4808, H.R. 5250) that would exempt the private non-commercial recording of copyright works on video recorders from copyright infringement. Enactment would remove the present cloud of illegality on everyone who manufactures, sells, now owns or will buy, or who even makes advertisements for a video cassette recorder. The attached paper, "The Case for Home Recording Rights", explains why this legislation is right and why it is needed now.

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February 1982

I. INTRODUCTION

Video cassette recorders for home audiovisual recording and exhibition are a recent but dramatic phenomenon in home entertainment. VCRs were first developed in the 1960s, but the present generation of VCRs was not introduced until 1975. There are now at least 3.2 million VCR units in American homes, with sales increasing significantly each year.[*]

VCRs can play commercially prerecorded audiovisual tapes, original tapes filmed with VCR cameras, such as home movies, and television programming recorded by the VCR itself. The primary use of VCRs for recording television programming is for "time-shifting" -- home recording of television broadcasts for viewing at a later time.[**]

Although there are thousands of copyright holders, only two participated in the court case charging that use of VCRs to record their copyrighted material off the air infringes their copyrights and causes them economic harm. In 1976, Universal City Studios, Inc. and Walt Disney Productions, both producers of movies and television shows, brought suit in federal court against William Griffiths, an individual VCR user; the Sony Corporation, the manufacturer of Griffiths' VCR, and the Sony Corporation of America; Doyle Dane Bernbach, Inc., Sony's VCR advertising agency; and Carter Hawley Hale Stores,

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[*] Television Digest, December 14, 1981, quoting data from the Electronic Industries Association (EIA).

[**] VCR consumer use patterns are discussed further in part VI.

Inc., Associated Dry Goods Corp., Federated Department Stores, Inc., and Henry's Camera Corp., VCR retailers.

Universal and Walt Disney claimed that home video taping of their copyrighted property constituted copyright infringement. The district court*/ held that the legislative history of the Copyright Act exempted private, non-commercial taping of copyrighted material from copyright infringement. The district court also found that such taping was not a copyright violation because it met the standards for permissible "fair use" under the statute.**/ The court also held that, even if home recording constituted a copyright violation, VCR manufacturers, distributors, retailers, and advertisers were not "contributorily" liable for that infringement, and that the copyright holders' injury was not significant enough to warrant an injunction against further sale or use of VCRs. The district court also concluded that the defendant VCR manufacturers, sellers, and advertisers were not contributory infringers because VCRs are "staple items of commerce" with varied uses, and defendants were therefore not responsible for buyers' subsequent illegal use of such products.

Universal and Walt Disney appealed that decision to the Ninth Circuit Court of Appeals, which in October 1981 reversed the district court decision.[*] The Ninth Circuit held that the individual home video taper and the VCR manufacturer, sellers, and advertiser were liable for copyright infringement for recording copyrighted audiovisual materials. The court rejected defendants' arguments that private, noncommercial taping is a non-infringing fair use and that manufacturers, sellers, and advertisers should not be held responsible for the use to which buyers put products that have multiple uses.[**]

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*/ Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. 429 (C.D.Cal. 1979) ("district court decision").

**/ For a discussion of the "fair use doctrine," see part II.B.

The Ninth Circuit did not decide what the remedy should be for defendant's infringements, but instead sent the case back to the district court to consider the defendants' affirmative defenses and, if necessary, to determine the appropriate relief for Universal and Walt Disney. The district court can award monetary damages to compensate the copyright holders for the past infringements. The court also has the power to issue an injunction against further use by current owners or against future manufacturing distribution, sale, or private use of VCRs in addition to money damages, if it believes such an injunction is appropriate. The Ninth Circuit also hinted broadly that, instead of issuing an injunction, the district court should consider the possibility of a "continuing royalty," basically setting the price to defendants for future use of plaintiffs' copyright materials.

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[*] Universal City Studios, Inc. v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981) ("Ninth Circuit decision").

[**] Additional information on copyright issues generally and the courts' reasoning in this case is provided in part II.

Defendants asked the Ninth Circuit to reconsider its decision *en banc* (review by an expanded panel) but were turned down on January 12, 1982. Sony has said it will seek Supreme Court review, and has until April 12 to file its petition for certiorari.[*] Universal and Walt Disney would then have 30 days after *Sony* files to file their responses opposing Supreme Court review, after which the Court will decide whether to accept the *Sony* case for review. The Court may decide whether to accept the case before its summer recess in June, but if certiorari is granted the Court may not hear argument and render a decision until it reconvenes in October. Once Sony files its petition for certiorari, the case will not return to the district court for further proceedings until after the Supreme Court has either denied the petition or, if grants the petition, has issued its decision.

In an obvious attempt to turn its victory in the *Sony* case into a judgment against the entire VCR manufacturing and distribution industry, Universal -- this time without Walt Disney -- has brought a second suit. *Universal City Studios* v. *RCA*,[**] filed a month after the Ninth Circuit announced its decision in Sony, alleges charges of infringement against 42 companies. Among the defendants are all the remaining major VCR manufacturers and distributors, including RCA Corporation, Zenith Radio Corp., Matsushita Electric Industrial Co., Ltd., and its subsidiary, Matsushita Electric Corporation of America; Sears Roebuck and Co., and seventeen advertising agencies that create ads for VCRs. This case is still in its very early stages.

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[*] A petition for certiorari is a statement to the Supreme Court explaining that the issues in the case are so significant that the Court should review the lower court's decision.

[***] *Universal City Studios, Inc. v. RCA*, Civ. No. 81-5723 FW (C.D.Cal., filed 11/6/81). See part II.C for a comparison of the *Sony* and *RCA* complaints.

Even at this point, it is clear that there are many diverse ramifications of the Sony decision. Consumers and sellers of VCRs immediately began to ask whether they would be held liable for private home video taping, although editorial writers almost unanimously condemned the idea, while cartoonists imagined video police raids and Mickey Mouse and Donald Duck suing youthful cartoon tapers. While VCR sales have remained strong since the Ninth Circuit decision was announced, it is impossible to know whether this represents an increased demand by buyers hoping to avoid future royalty fees on VCRs or a lower level of sales than would otherwise have been experienced had it not been for copyright liability worries.

Legislation has already been introduced that would exempt private, noncommercial video taping from copyright infringement liability, in order to allay these concerns and prevent injury to the VCR industry. Another legislative proposal has also been introduced that would create a system of royalty payments on VCRs and video tapes, administered by the Copyright Royalty Tribunal, intended to compensate copyright holders for home taping of their materials.*/

II. THE COPYRIGHT LAW AND THE VCR LAWSUITS

A. The Copyright Act

The Constitution gives Congress the power "to promote the progress of science and useful arts, by securing for limited times for authors and inventors the exclusive right to their respective writings and discoveries."**/ To further the Constitutional purpose, Congress passed the first Copyright Act in 1790, and has made periodic revisions, most recently in 1976.***/

The rights granted to a copyright owner under the 1976 Copyright Act include the exclusive right to copy his or her own work, to distribute it and, in most cases, to perform it. For example, the Copyright Act provides that the author of a novel covered by a copyright has the sole right to publish that novel as a book and to authorize its republication in a paperback edition or a magazine. If anyone exercises one of the copyright holder's exclusive rights without authorization, such as by including the novel in a fiction anthology, that person has infringed the copyright and the copyright owner is entitled to a remedy against the infringer.

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*/ These pending legislative proposals are described further in part III.

**/ Article I, Section 8, Cl. 8, U.S. Constitution.

***/ 17 U.S.C. §101 *et seq*.

A copyright owner's exclusive rights are, however, limited by certain statutory exemptions, which authorize activities that might otherwise constitute copyright infringement. For example, quoting brief passages of a new book in a book review is not infringement. These limitations generally reflect Congress' decision that the copyright owner's interests should sometimes bow to other concerns, such as the public's interest in increased access to copyrighted works.

As noted, anyone who violates any of the rights granted to a copyright owner is an infringer. A court may award the copyright holder two different kinds of relief for the infringement: (1) monetary damages and/or (2) injunctive relief. Monetary damages are designed to compensate copyright holders for the harm they have already suffered as a result of the infringements and to prevent the infringer from benefitting from its illegal act. The amount of a damage award may be calculated in one of two ways, at the copyright owner's option. The copyright owner is entitled to collect from each separate infringer either (1) actual damages (i.e., the reduction in the value of the owner's work resulting from the infringement, such as reduced resale value) plus any profits the infringer made on the use or exhibition of the copyrighted work, or (2) "statutory" damages of from $250 to $10,000, in the court's discretion, for each work infringed.

Injunctive relief, the second form of remedy, is not automatic; it is granted only if the court finds that it is necessary to prevent or restrain future copyright infringement. In fashioning an injunction, the court will consider whether an injunction intended to protect the copyright owner would also hurt the public, and whether it can tailor the injunction to the facts of the individual situation.

B. The Fair Use Doctrine

The "fair use doctrine," one of the exceptions to a copyright holder's exclusive rights to control its creation, helps to explain what kinds of use of copyrighted work are permissable (*i.e.*, do not constitute infringement). Under this doctrine, the public can copy or otherwise use copyrighted materials, without payment to the copyright owner and without liability for infringement, because the specific uses are considered socially valuable. Thus, for instance, the fair use doctrine allows excerpts of books, films, or other copyrighted materials to be used in a critic's review of the work or quoted in a scholarly study, and a teacher may, under certain circumstances, copy a poem for his class from a magazine or anthology without copyright liability.

The scope of fair use was a critical issue in the *Sony* case, with the two courts differing on whether home video taping is the kind of limited use that should be included under the fair use umbrella. The following description of the fair use doctrine should help explain how the district court and the Ninth Circuit, applying the same statutory criteria, could reach such diametrically opposed conclusions as to whether home video taping is fair use.

Judges originally developed the fair use doctrine because, as a practical matter, they were reluctant to find that certain kinds of copying amounted to copyright infringement.*/ The four "fair use factors" listed in Section 107 of the Copyright Act reflect Congressional codification of the judicial standards used before the 1976 Act to assess whether a particular use was fair and therefore excused under the law. Section 107 states:

> Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

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*/ Fair use is often described as a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." Rosemont Enterprises Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966).

> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

Congress explicitly noted, in the legislative history of the 1976 Copyright Act, that the broad statutory criteria for fair use are intended to be flexible enough to deal with new situations and technologies.*/ Courts are to consider these four factors in evaluating uses of copyrighted materials involving new methods of copying or transmission. The determination as to whether a use is fair is based on a weighing of the various factors and their relative importance in each situation. That is precisely what the courts have done in the VCR litigation.

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*/ Congress did not intend the codification to change the meaning of the fair use doctrine as developed by case law, and in fact wanted to retain its flexibility and applicability to changing circumstances. Thus, the House report states:

> "The statement of the fair use doctrine in Section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during the period of rapid technological change. Beyond the very broad explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case by case basis.
>
> Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976). See also S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

C. VCR Litigation

1. The Sony Case

In 1976 Universal City Studios, Inc., and Walt Disney Productions sued Williams Griffiths, an individual VCR user; Sony Corporation of America, the manufacturer of his VCR; several VCR retailers; and the advertising agency for Sony VCRs. In Universal City Studios, Inc. v. Sony Corporation of America,[*/] the district court held that home video recording was not a copyright infringement and that, even if it were, the manufacturers, distributors, and retailers would not be liable for the infringement.

The basis for the court's conclusion that home record recording was not an infringement was two-fold. First, it held that the implied copyright exemption for home taping applied equally to sound recordings and audiovisual recordings.[**/]

[*/] 480 F. Supp. 429 (C.D.Cal. 1979).

[**/] The home taping exemption is discussed in depth in part VII.

Second, after analyzing each of the four fair use factors, the court found that home video taping of copyrighted materials was "fair use" under the copyright law, and therefore not an infringement. The court recognized that home video recording usually involves copying an entire work (the "substantiality" test) that is primarily intended for entertainment rather than education ("nature of the work"). On the other side of the balance sheet was the fact that the use was non-commercial and limited to the home ("purpose of use"). The district court also based its finding that such recording was fair use on plaintiffs' failure to show a real danger of harm from home video recording ("effect of the use"). The court specifically observed that plaintiffs' claims of harm were speculative, contradicted by their growing profits and the numerous marketing alternatives available for selling their copyrighted products.*/

The Ninth Circuit disagreed with the district court on virtually every issue and reversed the lower court's conclusion of non-infringement. The Ninth Circuit initially observed that the broad exclusive rights granted to copyright owners by the Copyright Act are limited only by certain discrete exemptions, and exemptions not directly authorized by Congress should not be implied by the courts. Accordingly, the appellate court decided not to read the audio exemption to cover home video recording.

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*/ 480 F.Supp. at 451-452.

In reaching this conclusion, the court distinguished sound recordings, the home taping of which is considered fair use, from audiovisual recordings. As the Ninth Circuit saw it, the Copyright Act treats sound recordings and audiovisual works differently, and grants a higher degree of protection to audiovisual works. The court therefore refused to apply to audiovisual works the implied exemption from copyright infringement for home recording of sound recordings that had been attributed to Congress from the legislative history of the 1971 amendment to the Copyright Act. The Ninth Circuit held that Congress had never explicitly considered the home video recording problem, and that neither the Copyright Act nor its legislative history clearly indicated that home video recording was not within the set of exclusive rights granted to copyright owners by Section 106 of the Copyright Act. Home video recording would, therefore, amount to copyright infringement unless it constituted fair use of the copyrighted work.

Then, the Ninth Circuit took a far more restrictive view of the scope of the fair use doctrine than had the district court. The Ninth Circuit indicated that the fair use doctrine should be available only in instances involving the "productive use" of copyrighted material, and not where the copied work was used for the same purpose as the copyrighted work.*/ In the Ninth Circuit's view, permitting the copying of an entire work for its original purpose (here, entertainment) would erode the copyright system by depriving the author of total control over access to his work.

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*/ "Without a productive use, i.e., when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." 659 F.2d at 971-72.

The Ninth Circuit's analysis of the four factors listed in Section 107 confirmed its conclusion that home video recording is not "fair use." With respect to the purpose of the use, the Ninth Circuit stated that the district court's emphasis on the non-commercial home use of the copyrighted material was misplaced, because the non-commercial character of the use was only one factor to be considered in deciding whether such taping is "fair." In the Ninth Circuit's view, "copying of entertainment works for convenience" was not permissible as fair use.*/

As to the nature of the copyrighted work, the Ninth Circuit was willing to allow more leeway for copying informational works than creative or entertainment materials. Moreover, the Ninth Circuit concluded that the "substantiality of the taking" factor essentially barred a finding of fair use here because ordinarily the use involved taping the entire copyrighted work.

Concerning the fourth fair use factor, the impact of the copying on the original copyrighted work, the court emphasized that a copyright owner should not be forced to demonstrate harm in order to prevail. In the court's view, the proper standard is whether the copying tends to diminish or prejudice sales of the copyrighted work. It held that this standard was met here because the home copies were used for the same purpose as the original. The Ninth Circuit also recognized, however, that it would be difficult for a plaintiff to prove that harm was caused by any individual defendants. Finally, it criticized the district court for overlooking the cumulative detrimental effect of reproduction of copyrighted works made possible by the VCRs.

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*/ 659 F.2d at 972.

Having found infringement by the home video taper, the court went on to conclude that the defendant VCR manufacturer, distributor, advertising agency, and retailers were all liable as contributory infringers. These corporate defendants argued, and the district court found, that home video recorders, like typewriters and photocopying machines, are "staples of commerce" with substantial non-infringing applications, even if they have possible infringing uses. Manufacturers and sellers of such staples of commerce are not ordinarily liable for copyright infringements commited by their customers. The Ninth Circuit rejected the district court's conclusion on this point. It held that since the "primary purpose" of VCRs is to reproduce copyrighted television programs, they are not "suitable for substantial non-infringing use," and therefore cannot be considered staples of commerce.*/

Further, the court stated that the corporate defendants were contributorily liable for the infringement even if they did not have actual knowledge of the infringing activity by individual owners. It was enough that they knew the VCRs would be used to record copyrighted programs and that they had "induced, caused or materially contributed" to the infringing conduct. The Ninth Circuit agreed with the district court on only one issue -- that the retailers' copying of portions of copyrighted telecasts to demonstrate the capability of the VCRs was fair use.

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*/ 659 F.2d at 975.

The Ninth Circuit remanded the case to the district court to rule on defendants' affirmative defenses and fashion appropriate relief. The court confirmed that Universal and Walt Disney had not established actual damages or the infringer's profits, and noted that statutory damages might be appropriate since it would be difficult to measure the precise monetary harm to the copyright owners from the infringements. The appellate court also suggested that the district court consider the propriety of a continuing royalty or a permanent injunction, although the lower court was cautioned to assess whether an injunction would result in significant public injury. The Ninth Circuit also directed the district court not to weigh heavily the impact of relief on the defendant's profitability, since "a defendant has no right to expect a return on investment for activities which violate the copyright laws."[*/]

[*/] 659 F.2d at 976.

Defendants' request that the Ninth Circuit reconsider its October 1981 decision en banc was rejected on January 12, 1982. Those motions for reconsiderations had been supported by amicus petitions from Sears, the Consumer Electronics Group of the Electronic Industries Association, Matsushita Electric Industrial Co., Ltd. and Matsushita Electric Corporation of America (joint petition), and the Ad Hoc Committee for Copyright Laws. Sony has already announced that it will file a petition for certiorari seeking Supreme Court review of the Ninth Circuit decision. Further district court proceedings have been stayed pending action in the Supreme Court (i.e., denial of certiorari or issuance of a decision).

2. The RCA Case

Universal City Studios, one of the victorious plaintiffs in the Sony case, quickly filed a second and very similar lawsuit against RCA and 41 other defendant manufacturers and distributors of VCRs and their advertising agencies, in an attempt to extend the successful suit against Sony.*/ This case is still in its very early stages.

The complaint in the RCA case, like the earlier Sony complaint, alleges that the defendants are liable for copyright infringement, unfair competition under the Lanham Act, and common law unfair competition. Plaintiff has requested that the court grant relief in the form of (1) an injunction to protect its rights in copyrighted motion pictures; (2) judgment that specified copyrighted works have been infringed; (3) damages for these injuries, and defendants' profits for such infringements, and (4) a declaration that the use of VCRs to record copyrighted motion pictures constitutes copyright infringement for which defendants are liable.

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*/ Universal City Studios, Inc. v. RCA, Civ. No. 81-5723 FW (C.D.Cal., filed 11/6/81) ("RCA case").

There are several important differences, however, between the Sony and RCA complaints. First, Walt Disney Productions, a plaintiff in the Sony case, has not joined with Universal in bringing the new RCA case.*/ Second, unlike the Sony complaint, the RCA case does not name any individual home video tapers as defendants. In the RCA case, Universal added an allegation that defendants knew that purchasers would use VCRs to record copyrighted works and would omit or skip commercials, maintain tape libraries, and trade, swap, and duplicate recordings. Finally, the marketplace for VCRs and video programming that forms the backdrop for these cases has changed substantially since the Sony complaint was first filed in 1976.

III. VCR COPYRIGHT LEGISLATION

Two major types of legislation dealing with the application of copyright laws to VCRs and video recording tape have been introduced in Congress in response to the Sony decision. The following is a description of the provisions of those bills and of their relationships to the issues discussed elsewhere in this paper.

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*/ Walt Disney Productions commented that it would never have joined Universal in the initial suit had it known that VCRs would become so popular and widely used.

A. Exemption Legislation -- S. 1758, H.R. 4808

These identical bills, introduced by Senator Dennis DeConcini (D-AZ) and Congressman Stan Parris (R-VA), are very simple. They provide that it is not copyright infringement for an individual to record copyrighted works on a video recorder if --

> "(1) the recording is made for a private use; and
> (2) the recording is not used in a commercial nature."

This exemption would be added to a list of other exemptions already contained in the Copyright Act.

The conditions placed on the exemption are also clear enough. The legislation is designed to eliminate any copyright infringement liability for personal uses of video recorders. In this regard, it is of note that the bill would be applicable to all recordings made for "private use" regardless of where the recording was actually made or used. That phrasing eliminates needless technical problems which might arise if the bill exempted "home" or "family" uses.[*/] To the extent that a

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[*/] Two bills were introduced in the House of Representatives which would exempt video recording for "home use." H.R. 4783 (Mr. Duncan) and H.R. 4794 (Mr. Parris). While well-intended, this formulation is unduly restrictive and could result in nuisance claims concerning recordings made or used in an office or other non-"home" setting, regardless of the fact that the use was not for any commercial purpose. The formulation of S. 1758 and H.R. 4808 eliminates this potential problem.

use is actually for commercial purposes, the exemption would not apply, and the copyright holders would be free to demand (and obtain) appropriate legal remedies, e.g., royalty payments or court orders halting the activity.

While not explicitly stated in these bills, this legislation would also eliminate "contributory liability" as applied by the Ninth Circuit to various manufacturers, sellers, and advertisers of video recorders. If there is no infringement of a copyright in the first place, there can be no charge that such persons contributed to an infringement.

B. Royalty Fee Legislation -- Amendment No. 1242

On December 16, 1981, Senator Charles McC. Mathias (R- MD) introduced an "amendment in the nature of a substitute" for S. 1758. As the phrase in quotes indicates, this proposal is not an addition to S. 1758 but rather would replace the operative terms of the original bill with an entirely different approach. In other words, Senator Mathias' proposal could have been introduced as a freestanding bill without need for any changes or additions. As its relative length -- 13 pages versus less than 2 pages for the exemption bill -- suggests, this "amendment" is more complicated than the vehicle to which it is attached.

1. Video Taping Is Copyright Infringement

The Mathias amendment declares that all reproduction of copyrighted audiovisual works through video taping is copyright infringement. Individuals who tape for non-commercial purposes, however, would not be liable for the infringement. Instead, the liability would be placed on the importer or manufacturer of video recording devices or media (such as tape) for the infringing activity of individuals who reproduce copyrighted works using the video recording devices and media.

2. Compulsory License

Each video product (*i.e.*, recording device or recording medium) manufacturer and importer would be required to obtain a compulsory license. A compulsory license generally enables a person to use a copyrighted work by complying with certain conditions, notwithstanding the fact that the use would otherwise be infringement. Under the Mathias amendment, a video product manufacturer or importer could obtain a compulsory license by registering and by filing account statements with the Register of Copyrights. Registration would require a filing of a "Notice" with the Register within sixty days of the Act's effective date. The account statements would be filed periodically and would indicate the quantity and type of video product manufactured or distributed during the relevant time period.

This compulsory license would be required for each manufacturer or importer of a "video recording device" or of a "video recording medium." Under the amendment, a "video recording device" is defined as "any machine or device of a kind used or promoted for the primary purpose of making video recordings by individuals in private homes." This definition appears to encompass every VCR on the market, even if primarily used to record non-copyrighted material or material for which the copyright holder has consented to private recording.

Similarly, a "video recording medium" is defined as "any material object . . . in which a motion picture or other audiovisual work can be fixed by use of a video recording device." This definition includes blank video tapes but is broad enough to include prerecorded tapes as well. Such tapes are produced using commercial equipment which is more sophisticated than the home VCRs covered by the amendment's definition of video recording device. Home VCRs are also capable, however, of producing such tapes, and thus prerecorded tapes would fall under the definition of video recording medium. Further, new material can be recorded over the prerecorded material using a home-style VCR, again bringing the prerecorded tapes within the definition of video recording medium. The significance of this, apart from the potential for confusion, is that purchasers of prerecorded tapes could be charged a double royalty -- once for the material which is already on the tape and once because the tape is subject to the fee on a "video recording medium." At the very least, this adds another thorny issue to the CRT's burden under the amendment.

3. Royalty Fees

The Mathias amendment requires manufacturers and distributors of the defined video products to pay a royalty fee to be determined by the Copyright Royalty Tribunal ("Tribunal"). The Tribunal, created by Congress in 1976 as an independent agency in the Legislative branch, is composed of five Commissioners and charged with making determinations concerning the copyright royalty rates for records, jukeboxes, and certain cable transmissions. It also distributes the royalty fees and, in case of controversy among claimants, determines their distribution.*/

The Mathias amendment requires that the Tribunal hold a formal proceeding to establish "appropriate and reasonable" royalty fees so that copyright owners receive "fair compensation." The amendment also allows the Tribunal to set rules by which royalties either would not be paid at all on tapes used principally for purposes other than making home video recordings of copyrighted material or would be reduced for all tapes and devices to account for the fact that not all VCR uses infringe on copyrights. Presumably, before setting rules on this issue, the Tribunal would weigh evidence on the proportion of tapes used for these various purposes.

A draft of Mathias' statement on his amendment had suggested that royalty fees might be appropriate on tapes but not the VCRs themselves. His final statement when the amendment was introduced did not, however, include such a provision. The only indication that the Tribunal should consider the fact that VCRs are used for noninfringing purposes is in the adjustment to the royalty fee noted above. On that point, Mathias' introductory remarks included the following:

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*/ See part IV for a more detailed discussion of the Copyright Royalty Tribunal.

> "[T]he Copyright Royalty Tribunal will have authority to consider all relevant factors in setting the royalty. One of these factors is the number of tapes not used for recording copyrighted works. For instance, should the Tribunal find that some percentage of the blank tapes sold in this country are never used to record copyrighted material, it could adjust the royalty fee accordingly. Similarly, the Tribunal will be able to take into account the nature of video recording practices, such as time-shifting."

Unfortunately, the legislation itself contains no guidance to the Tribunal on how to determine the extent of non-infringing usage or how to use such information to adjust royalty fees. Also, there is no guidance as to how to treat "time-shifting" use, which Mathias' introductory remarks seem to suggest is less bad than some other video taping activities.

Once a fee determination is made, a manufacturer or importer must pay the Register of Copyrights when submitting the account statements. The amendment does not provide, as did an earlier draft, that the Tribunal may waive payment of a royalty fee if it is insufficient to cover the cost of collection.

4. Copyright Royalty Tribunal's Proceedings

The Mathias amendment requires that within thirty days of the Act's effective date the Chairman of the Tribunal publicly announce the commencement of proceedings to determine "appropriate and reasonable" royalty fees. Within one year of such notice the Tribunal would be required to render its final decision. That decision would be effective within thirty days following its publication. The amendment specifically precludes a stay of the effective date of the decision pending a court appeal. Thus, within fourteen months of the date of enactment of the legislation, manufacturers and distributors would be required to start paying royalty fees. The Tribunal is supposed to consider evidence and studies on VCR usage and other matters. Considering the numerous complex issues and the Tribunal's demonstrated inefficiency, Tribunal compliance with this rigorous schedule is unrealistic, and requiring payments before appeals are decided is unfair.

Under this amendment, this lengthy process would be repeated in 1985 and every five years thereafter.

5. Claims for Royalty Payments

The Mathias amendment provides that the royalties are to be distributed to copyright owners who file claims individually or in groups. If the Tribunal finds that a controversy exists between claimants concerning distribution of the royalties (a likely possibility), then the Tribunal will hold a formal proceeding. Neither the Mathias amendment nor the statement provides any clue as to what criteria the Tribunal should use in distributing the revenues.

6. Non-Compliance

The Mathias amendment provides that manufacturers or importers who distribute video products regulated under the legislation without a compulsory license are subject to all sanctions available under the Act. Such sanctions include injunctions, impoundment and destruction, actual damages, statutory damages, and criminal penalties. The amendment also permits a court to deprive an importer or manufacturer of the benefits of a compulsory license for a period not to exceed ninety days.

7. "First Sale" Doctrine Modified for Sound Recordings and Video Tapes

The "first sale doctrine" is a principle of copyright law whereby a copyright owner's right to control his product ceases with respect to a particular copy once he has parted with ownership of it. The purchaser is entitled to resell, lease, or even destroy the object. (He may not, however, copy it.) The "first sale" doctrine thus recognizes that the copyright owner's interest in controlling the distribution of a particular work is generally fulfilled upon consent to the first sale of the work. The Mathias amendment would allow the copyright owner to prohibit or otherwise regulate the rental or loan of copies of its product if the person renting or lending it received any commercial benefit. Thus, a copyright owner could even forbid exchanges or swaps of prerecorded tapes between families.

This restriction of the first sale doctrine would probably increase charges to consumers for video cassette rentals. Video dealers can now purchase video cassettes from movie companies and lease them to as many customers as are interested. The Mathias amendment, however, would give the movie companies the power to prevent such rentals, or to limit them so drastically that dealers will either have to charge much higher rental prices or go out of the rental business entirely.

This provision is a significant departure from historic copyright law principles. Further, this is the only provision of the amendment which would apply beyond the video field, to sound recordings. While the proposal is intended to make certain that copyright owners of movies and records are able to participate in the commercial benefits of renting their products, the solution of eliminating this historic copyright doctrine seems too radical. This is especially true since such copyright holders can participate, and in several cases are already participating, in the apparently lucrative rental market simply by not selling the product in the first place. This leaves them free to rent their products themselves and to control rentals by others.

IV. THE ROLE OF THE COPYRIGHT ROYALTY TRIBUNAL

The major proposal for compensating copyright owners for home video recording of their works is the suggestion that Congress authorize the Copyright Royalty Tribunal ("CRT") to administer a system of copyright royalties for video recording. This legislation, proposed by Senator Mathias, would give the CRT substantial responsibility for evaluating, setting, and distributing compulsory royalties for video recording, with only minimal legislative guidance.*/ The CRT's dismal record in discharging its existing responsibilities, however, suggests that it would be absurd to burden with substantial and complex new duties a body whose own chairman has recommended be abolished.**/

A. Duties of the Copyright Royalty Tribunal

The 1976 Copyright Act provides that specified uses of copyrighted works are subject to compulsory licenses, under which royalties must be paid for the privilege of using the works. Royalty fees are collected from users of copyrighted materials, including operators of cable television systems, jukebox owners, and public broadcasting stations, and distributed to individual copyright owners or their representatives, such as ASCAP and BMI.*/ The compulsory license provisions are intended to assure that copyright owners are paid for the use of their works in circumstances in which Congress has determined that marketplace negotiations would not succeed, either because they would be too complicated or because the copyright owner would have the bargaining power of a monopolist.

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*/ The proposal, Amendment 1242 to S.1758, is described in part III.

**/ Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Committee on the Judiciary, 97th Cong., 1st Sess. 51 (March 4, 1981)(testimony of Clarence James, Chairman, Copyright Royalty Tribunal) ("James").

The Copyright Royalty Tribunal is an independent agency established in 1976 to issue rules concerning the rates for these royalties and the distribution of payments to copyright owners from the central fund under the compulsory license provisions of the Copyright Act.**/ For example, the CRT determines the proper distribution of compulsory license royalties for cable retransmission of certain television broadcast signals and for jukebox performances of musical compositions.[*] Even where the Copyright Act specifies the compulsory license fees, as in the case of jukebox performances, cable retransmissions, and record sales, the CRT must periodically review these rates and adjust them if warranted. Congress has also given the CRT responsibility for determining license fees for public broadcasting use of certain copyrighted works. CRT decisions establishing compulsory license fees or distribution of license fees are subject to judicial review by the courts of appeals.[**]

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*/ Specifically, compulsory licenses apply to certain cable retransmissions, 17 U.S.C. §111, jukebox performances, §116, phonorecords, §115, and public broadcasting use of certain kinds of copyrighted works, §118.

**/ 17 U.S.C. §800 *et seq*.

B. The CRT's Record

The CRT has been plagued since its creation by inadequacies and failures. A principal problem has been its apparent inability to establish workable criteria for determining royalties, for which Congress provided no clear-cut standards. The Copyright Act simply directs the CRT to balance such vague and subjective criteria as "the relative roles of the copyright owner and the copyright user in the product made available to the public"; "maximizing the availability of creative works to the public"; and the need to provide "a fair return" to copyright owners for their creations.[*/] Wilbur D. Campbell, Deputy Director of the GAO, has accurately noted that "the current appeals of [four of the five] key Tribunal decisions attest to the vagueness of the legislated criteria since each of the appeals challenges the very basis of the Tribunal's decisions."[**/]

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[*] Copyright owners receive their fees directly, without government involvement, for phonorecord sales and public broadcasting use. See generally Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Committee on the Judiciary, 97th Cong. 1st Sess. 85, 87-89 (statement of Wilbur D. Campbell, Deputy Director, Accounting and Financial Management Division, General Accounting Office) ("Campbell").

[**] 17 U.S.C. §810.

In the meantime, as the appeals process drags on, millions of dollars in copyright royalties remain undistributed. The problems caused by the CRT's failure to make timely distributions are enormous, according to former CRT Chairman James.[***/] James said that payment to copyright owners ideally should be made within a year after the royalties are paid into the government fund, yet disputes which drag on for four to five years can be expected to become the rule rather than the exception.[****/] Pending the disposition of appeals and eventual distribution to copyright owners, over $41.6 million in cable funds remain on deposit with the Treasury Department from 1978, 1979, and 1980 cable royalty payments. According to Chairman James's estimates, the appeal on the 1978 funds "may be" concluded in 1983, barring a remand of the proceedings to the CRT and any subsequent appeals. Similarly, nearly $2.2 million in 1979 and 1980 jukebox royalty funds remained undistributed. A total

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[*/] 17 U.S.C. §801(b).

[**/] Campbell at 81.

[***/] James at 56-57.

[****/] *Id.*

undistributed royalty fund of over $100 million is not an unreasonable estimate for the near future, in James' view, "because of the existing appeals, and the possibility of future appeals on each and every distribution proceeding held by the Tribunal."*/

Even if Congress had set out clearer standards for CRT decisions, the agency would not be able to handle complex rate review and distribution matters. Several basic organizational flaws impede the CRT's ability to reach prompt, supportable decisions.**/ For example, although the CRT's decisions have a direct financial effect on groups affected by compulsory licenses, the CRT receives only such evidence as the parties before it choose to submit because it lacks subpoena power. In addition, the Tribunal has no general counsel, although its duties require it to deal with complex legal issues involving contracts law, the First Amendment, and the Administrative Procedure Act, as well as copyright law. Indeed, only two of the five original commissioners were lawyers, and only one had any significant familiarity with copyright law before his appointment. Similarly, although economic analysis is critical in determining appropriate royalty rates and distribution, the CRT retains no economic consultants. Due in part to its lack of expertise and its inability to compel the production of relevant evidence, CRT proceedings have crept at a snail's pace.[*/]

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*/ James at 57.

**/ Campbell at 94-102.

Under the current system, copyright owners "are effectively being denied their just rewards -- the proceeds from the royalty funds timely paid."[**/] In fact, copyright holders are footing part of the bill for the CRT's inefficiencies, since the costs of the CRT's royalty distribution procedures -- a total of over a half-million dollars in 1978 -- are deducted from the royalty pool.[***/]

The CRT has obviously failed to discharge its responsibilities for royalty determination and distribution under the existing compulsory license provisions. Giving the CRT new responsibilities for royalties for home video taping of copyrighted materials would only compound the present administrative nightmare. For example, there are no easy guidelines or CRT precedents to help it establish video royalty rates. In other proceedings the CRT has been able to look to broadcast logs, record sales, or jukebox revenues for some objective starting point for determining the use made of copyrighted works covered by compulsory licensing.[****/] There is no similar basis in the VCR area for determining the extent of home video recording of copyrighted works.

[*/] Campbell at 79.

[**/] *Id.*

[***/] *Id.* at 78.

[****/] James at 54.

The CRT would also have to grapple with the difficult question of how to reflect the use of VCRs for "time-shifting" purposes in its rate determinations. These decisions could require the CRT to study VCR users' actual recording behavior, with the attendant expense and difficulty of conducting such studies and a danger of privacy intrusion from monitoring home viewing.

The obvious conclusion, given the complexity and character of the decisions that have to be made about compensation for video taping, is that the CRT is not the right place to make them. They are better left to the competitive marketplace of copyright owners and broadcasters which has the incentive, responsiveness, and sensitivity to set compensation levels that accurately reflect the value of video taping copyrighted material.

V. COMPENSATION FOR USE OF COPYRIGHTED MATERIALS

A. Broadcast Licensing

Some holders of copyrights on programs and films broadcast on television claim that any copyright exemption for home video recording would "strip from authors and creators the rights to their property without just compensation."*/ This argument completely ignores the highly competitive marketplace

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*/ Hearings on S. 1758 Before the Senate Judiciary Committee, November 30, 1981 (testimony of Sid Sheinberg, President and Chief Operating Officer, MCA, Inc. at 2). MCA is the parent company of Universal City Studios, Inc., plaintiff in the *Sony* and *RCA* cases.

in which television broadcasters and copyright holders who create programming negotiate broadcast license fees. There is no reason to create a cumbersome, intrusive, and inefficient government system for the same purpose, given the existence of this efficient and flourishing free market mechanism through which copyright holders can promptly and directly receive fair compensation. Even Jack Valenti, president of the Motion Picture Association of America, recognizes that the best way to determine the fair value of copyrighted properties is through direct negotiations between copyright holders and exhibitors, as evidenced by his challenge to cable operators covered by compulsory licenses to "go in and bargain like your competitors."*/

1. Audience measurement techniques

A barrage of contradictory claims has beclouded the basically clear-cut question of the extent to which VCR use is and can be reflected by the Nielsen and Arbitron television audience rating services. Both systems of audience measurement currently in use, television meters (Nielsen) and diaries (Nielsen and Arbitron), are clearly capable of obtaining information on VCR usage.**/ The Nielsen stratified random audience sample of 1200 metered homes, the basis of the principal Nielsen rating scores, "reflect[s] actual VCR usage."*/

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*/ "Meet casts doubts on direct broadcast," Advertising Age, October 12, 1981.

**/ See, e.g., Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. 429, 441 (C.D.Cal. 1979).

The Nielsen system is clearly capable, therefore, of providing significant data on VCR use. VCR recording of a television program is reported by the meter as part of the audience for that program. If a metered set is playing one program while the VCR is recording a second program, the Nielsen rating will credit each program with one viewing.

Like the Nielsen meter ratings, the Arbitron diary system includes VCR time-shift viewing in the audience for the taped program, by recording both the taping and playback of every show.**/ The Nielsen diary surveys already seek information on VCR ownership, and the company is "testing modified diaries to obtain information on VCR usage" in the future.***/

The ratings services are highly responsive to the demands of broadcasters, advertisers, and program producers for additional and specialized audience information, frequently revising their surveys to reflect customer needs and changes in viewer behavior and equipment. For example, Nielsen is including additional cable homes in their survey starting this year, in response to broadcasters' requests.*/ The Nielsen meter sample now includes only about 1.7% (20) VCR homes (as of June 1981), which accurately reflects the percentage of VCR users as a proportion of the television audience nationwide but is inadequate to support specialized data on VCR viewing patterns. However, the Nielsen Company will increase the representation of VCR households in their sample to reflect their increasing popularity.**/

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*/ Letter of William S. Hamill, Executive Vice-President, A.C. Nielsen Company Media Research Group, to Gary J. Shapiro, January 6, 1982 ("Hamill letter"). See also "Nielsen Co. Does Monitor VCR Usage, But . . . ," Consumer Electronics Daily (December 3, 1981) at 2.

**/ "VCR diary entries which indicate that the program is being taped on a Video Cassette Recorder are credited to the station identified in the entry. Entries indicating a playback of a program previously recorded during the same diary week will be moved to the day and time of initial recording. Playback entries of programs recorded other than during the same diary week will be deleted from the dairy." Arbitron, "Description of Methodology" (October 1980) at 18.

***/ Hamill Letter. See also Nielsen Home Video Index, Study of Video Cassette Recorders: Special Research Report ii (May 1980) ("Nielsen Study").

The services have also developed new technology for "Automatic Monitoring of Lineups" that can code each television program so that Nielsen's in-home monitors can identify what material is being played back on a VCR. This system could be used in the future to provide detailed information on VCR use to broadcasters, advertisers, and copyright owners.

These developments in the sensitivity of ratings to VCR viewing patterns demonstrate that the ratings services will report whatever audience data their broadcaster and programming customers require to value their products and conduct their negotiations. It is unreasonable for copyright holders

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*/ Nielsen Television Index, *NTI . . . The New Generation 1981* 4-9 (1981).

**/ *Id*. at 9.

to seek a massive Federally-administered royalty system simply because data on the VCR audience are presently limited. The copyright owners themselves have the power to obtain whatever additional information they need to determine who is watching their programs and what they are worth as audience members. The movie industry itself recognizes that the availability of ratings that fully reflect VCR use seriously undercuts the claim that they are not compensated for the VCR time-shift audience.[*/]

2. Broadcast negotiations

The television broadcast negotiation process consists of two separate but related sets of transactions. In one set, broadcasters typically purchase the right to broadcast program material -- movies, continuing series, entertainment "specials," documentaries -- from organizations that produce or own such properties ("the copyright holders"). In the second series of transactions, broadcasters sell to advertisers the right to show their commercials in particular time slots. The value of program broadcast rights transferred in the first transaction is determined primarily by the amount advertisers are willing to pay to have their messages shown during specific programs, which depends in turn on the size and characteristics (*e.g.*,

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[*/] Sheinberg testimony at 7 and colloquy with Senate Judiciary Committee members.

age, sex, income) of the viewing audience.[*] The broadcaster is, in effect, the mediator in the process of setting the market values of program material and advertising time.

The commercial television broadcasting marketplace is competitive, with three major national networks vying for programs and films among themselves and, in many cases, with other distribution options such as non-network stations, cable and subscription networks, theatre exhibition, and videocassette sale and rental.[**] Negotiations for some types of programs (e.g., popular feature films; promising television series; major sporting events) can be intense. Copyright holders often have significant power in such transactions, as demonstrated by their ability to compel broadcasters to accept commercially unattractive properties in package deals with more valuable ones; order a guaranteed minimum number of shows in a series; and assume a share of production costs. Copyright holders also have the ultimate power to withhold their product completely any time the compensation they are offered for it is inadequate, or to sell the property for another use that commands a higher price. The decision of Walt Disney Productions to limit distribution of some of its films to theatres and not to offer them on television or on video cassettes is an excellent example of a rational economic decision to sell its product for its highest (and most profitable) use.

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[*] Other factors that affect prices for broadcast rights and advertising time, such as prestige (association with quality offering for broadcaster or advertiser), are not relevant to the VCR issue and are not discussed here.

[**] Although programs can obviously be made available simultaneously to any of these distribution systems, "exclusivity" against competing forms of distribution is often the rule in licensing arrangements and is an important element of the value of a property.

A compulsory license system such as would be created by Senator Mathias' amendment to S. 1758*/ is appropriate only when there is no available market mechanism for compensating a copyright holder for use of its property, as when it is impossible for each jukebox operator to negotiate individually with hundreds of copyright holders. Such a compulsory license machinery has no place in the television broadcast marketplace, which already has a vigorous competitive process of one-to-one negotiations that is capable of establishing and allocating the fair value of programming and compensating copyright owners for the right to use their property.

A compulsory license system would replace the flexibility and efficiency of the existing individualized system with a slow, complex administrative structure to establish collect, and distribute royalty fees, and cannot possibly be as responsive as the existing system to changing market conditions. As Copyright Royalty Tribunal Chairman Clarence James, Jr., said in Congressional testimony, the effect of a compulsory license is to eliminate the marketplace in which the true value of copyrighted property can be determined and to replace it with the interference of an inexpert, inefficient, and unwieldy federal procedure.[*]

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*/ See part III for an analysis of the bill.

B. Advertising and the VCR Audience

Advertisers and broadcasters determine the commercial value of the VCR audience through their negotiations for television advertising time. Since television rating services already reflect the VCR audience, advertisers are currently "paying for" those viewers as they do for the rest of the audience. However, advertisers could explicitly vary what they pay to advertise to VCR users if they believe they are a more or less desirable audience.

VCR owners represent an "upscale" segment of the market, with high incomes and other favorable consumer characteristics (*e.g.*, age, education, professional status).[**] The VCR audience may be so attractive to advertisers that they are willing to pay a premium for the chance to communicate with them, despite questions some have raised as to whether VCR viewers actually watch the television commercials during playback. VCR viewers, such as those who work at night, may also represent an incremental audience, many of whom would not otherwise be able to view a particular show. By gathering

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[*] James at 53, 62.

[**] Network Inquiry Special Staff, Federal Communications Commission, *Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players in the United States* (1/11/79) at 67 ("FCC Home Video Study"); Nielsen study at I-5.

detailed information on VCR viewing patterns, advertisers could make fairly precise determinations about the value of specific groups of VCR viewers. For example, if the incremental VCR audience for afternoon "soap operas" consists of employed persons with more attractive demographic characteristics than typical afternoon viewers, advertisers might be willing to pay even more per capita for the added VCR audience segment than for the regular audience.

The value of the VCR audience depends in large part on that group's viewing patterns, and in particular on whether VCR viewers see advertisements in any different proportion than the regular viewing audience. It is already clear that during commercials a substantial proportion of the regular television audience goes to the refrigerator or talks to other viewers; turns off the sound on the sets; changes channels to catch a bit of another program; or otherwise does not watch the advertisement. VCR users may watch ads in much the same proportion as other viewers, or their ability to "fast forward" may permit more of them to skip commercials, just as non-VCR viewers skip commercials. On the other hand, "fast forwarding" through advertisements may in fact require greater than average attention to ads, while repeat viewings of videotaped television programs may actually increase the number of times VCR viewers see the ads.*/

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*/ "Fast forwarding" is a feature on some tape recorders that enables the person viewing the tape to advance it quickly.

[foootnote continued on next page]

Data indicate that only a small portion of the VCR audience deletes or skips commercials, and that most watch commercials in their entirety when they play back recorded programs.*/ For example, various studies show that only between 11% and 25% of VCR owners use the "fast forward" capability through commercials during play back.**/ According to MCA's own Field Study, 56.1% of users "never," "rarely," or only "sometimes" employ fast forward to accelerate commercials.***/ Thus, there is no reason to assume that videotaping means a lost audience for advertising. In any event, audience studies can answer these and other questions about VCR viewer behavior now and as video tape technology changes over time.****/ The data from these studies would allow advertisers to predict the likely viewing patterns and value of the VCR audience.

Advertisers themselves have expressed no concern about the effect of VCR use on audience profiles or behavior.

[footnote continued from preceding page]

"Fast forwarding" through commercials does not eliminate them, but simply speeds up the tape; the viewer sees the entire message and must pay attention to determine when the commercial is over in order to return to regular speed for the program.

*/ FCC Home Video Study at 60-64.

**/ *Id.*

***/ *Id.* at 66.

****/ Devices to omit or skip commercials during play back of video recordings are another development on the horizon. These accessories vary greatly in capability, effectiveness, and cost, but in any event are available at this time only on a very limited basis.

VCRs represent only a fraction of all television homes, accounting for 3.2 million out of 75 million homes. Even optimistic estimates set the number of VCR homes at no more than 8.5 million in 1985. Advertisers are currently paying for VCR viewers as a regular part of the viewing audience, as recorded by the major rating services. As long as VCRs are only a small fragment of the total audience there may be no reason for advertisers to treat VCR users separately.

Movie producers are thus in the unusual position of championing the cause of advertisers who themselves have not noticed or do not care about the alleged injury to their audiences from VCR use. Since advertisers are willing to pay broadcasters for the audience of VCR users, copyright holders should be able to command compensation for those viewers in their own negotiations with broadcasters. The existing negotiation system can provide for fair compensation to all parties.

C. Compensation in the Cable Television System

Copyright owners are not entitled to additional compensation, beyond what they are already paid to allow their programs to be shown on television, simply because some viewers choose to watch those programs at a more convenient time with the aid of a VCR. Congress has reached an analogous conclusion in a similar situation involving retransmission of broadcast signals by cable television systems.

Cable systems are required by the Federal Communications Commission to retransmit the signals of all local television stations.[*/] The 1976 Copyright Act grants them an immunity from copyright infringement for the transmission of these local "must carry" signals.[**/] In addition, in order to retransmit signals from distant stations, the cable operator must obtain a "compulsory license" for which it pays royalty fees based on the system's gross receipts for its basic service.[***/]

Significantly, however, Congress determined that copyright owners of programming retransmitted in the same local area would not be entitled to royalties fees because the cable retransmission caused them no harm. Copyright owners were explicitly found by Congress to have been fully compensated for the local audience through their negotiations with broadcasters:

> . . . there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.[****/]

The basis for this conclusion is that local retransmission does not alter the size of the local audience for the

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[*/] 47 C.F.R. §§76.59(a), 76.61(a), as amended in Report and Order in Docket Nos. 20988 and 21284, 45 Fed. Reg. 60186 (1980) at Appendix E.

[**/] 17 U.S.C. §111(d).

[***/] 17 U.S.C. §111(d)(2)(B).

[****/] H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 90 (1976).

broadcast but merely affects the way in which some viewers watch the program, for example, with improved reception from a stronger signal. The effect of VCR use on the audience for broadcasts of copyrighted programs is almost identical: viewers can watch the same program several hours later, for example, or broken into segments that suit their schedules. The critical factor in both cases is that copyright owners receive full compensation for the entire measurable audience, even if technology permits variations in the means of capturing and watching the signals.

D. Conclusion

The implication of this description of broadcast licensing arrangements is clear: video copyright owners are fully compensated by the existing system for the right to broadcast their shows to a viewing audience that includes VCR users, since advertisers pay the same for those VCR users as for the rest of the television audience. If they are not satisfied with the current levels of compensation, or feel that they do not reflect certain special characteristics of VCR viewers, copyright owners have the same rights as sellers in any competitive market -- demand a higher price, refuse to sell their products at an unsatisfactory rate, or sell to another buyer. If copyright holders' compensation is "inadequate," that is the result of their own negotiations. It is certainly no justification for seeking a bonus, in the form of copyright royalties, to pay for viewing by an audience for which they are already compensated by broadcasters.

VI. CONSUMER USE OF VCRs

A. Emphasis on Time-Shifting

Understanding the purposes and patterns of consumers' VCR use is a key to evaluating the effect of this technology on copyright holders' interests and profits. Time-shifting -- video-taping a television broadcast for viewing later at a more convenient time -- is clearly the principal purpose for which consumers use VCRs.[*] The major studies of VCR use all substantiate this conclusion, indicating that time-shifting accounts for from 75% (Mediastat viewer diary study, 1979) to 82.4% (Crossley Surveys, Inc. survey for Sony, 1978) of all VCR use.[**] Fully three-quarters of VCR owners bought the units for the purpose of recording TV shows they could not otherwise watch (Arbitron study, 1978), and more than half of their actual use was for time-shifting (Field Research Corporation for MCA, 1978).[***]

Copyright holders and broadcasters are concerned that VCR owners are building tape "libraries" of copyrighted material that they watch over and over without any compensation to the copyright holder or instead of current material on which the copyright holder receives a royalty (*e.g.*, current TV programs; prerecorded tapes). User behavior suggests, however, that library building is not a significant element of VCR use, and that the attractiveness of tape libraries compared to purchase and rental of prerecorded tapes will decline over time as technology and video markets change.

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[*] FCC Home Video Study at 61; Nielsen Home Video Index, *Study of Video Cassette Recorders: Special Research Report* vii - ix, 25 (November 1979).

[**] Home Video Study at 61.

[***] *Id*.

Most users view the programs they have recorded soon after the original broadcast, frequently during the same day (e.g., afternoon soap opera played back after work) and almost always within a week.*/ VCR recordings of television programming are usually viewed only once, and then the tape is reused for recording other material.

VCR owners typically do not maintain recorded programs for repeat viewings. The Field Study found that 56% of VCR owners had fewer than 10 recorded tapes, including both original and non-copyright-protected material (e.g., home movies, sports events, prerecorded tapes) and material protected by copyright (e.g., recent movies recorded from television).**/ The "typical" library contains no more than 25 tapes (Crossley), and more likely fewer than 19 tapes,***/ again with no distinction between copyrighted and noncopyrighted materials. Recorded material is apparently kept for only a short time: seventeen percent of VCR users never saved a taped program longer than a month, and an additional 62% had done so no more than 10 times (Kalba-Bower Associates Study, 1978).*/ Another study showed than only 18.1% of users planned to keep their recent recordings (Arbitron).**/

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*/ FCC Home Video study at 62.

**/ Id. at 62-63.

***/ Id.

B. Trends in VCR Use

Future use patterns and technological factors will reduce the relative attractiveness of libraries of home recordings and strongly favor purchase and rental of prerecorded tapes for which copyright holders receive royalties from the manufacturers or renters. Recordings from television broadcasts already have significant disadvantages: the quality of prerecorded tapes is much better than tapes that depend on the clarity of broadcast signals and home television reception. Prerecorded film tapes are not cut to meet television's time and subject matter limitations and they contain no advertisements, thus no problems of editing out or skipping over the commercial interruptions. Such prerecorded tapes are already widely available.

The advantages of prerecorded tapes will increase even further as their prices decline. Recording a film on a blank tape that costs $11-20 is obviously economically irrational when an uncut, uninterrupted tape of superior quality can be rented in many areas for as little as a dollar a day or $4-5 a week. This inevitable trend is in the interests of copyright holders because more and more VCR viewing will be of material for which they receive either attractive royalties or direct compensation (if they sell or rent their properties themselves, as many film companies do or plan to).

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*/ Id.

**/ Id.

VCRs owners are constantly offered new programming options and technology. The increased popularity of portable VCR units and video cameras, which together can replace traditional home movie equipment, will also expand the VCR user's non-copyrighted viewing choices. Sales of portable VCR units doubled from 1980 to 1981, and are expected to represent half of industry sales (1.5-1.75 million units) by 1985. One out of five VCR owners is estimated to be in the market for a video camera, and 80% of portable VCR purchasers are expected to buy a camera as well.*/ The educational, entertainment, and communication uses of the video recorder-camera combination (e.g., to record special family events; mail family "video letters" to distant relatives; improve sports techniques; create original programming) are likely to reduce use of VCRs simply for recording television broadcasts.

Other developments in VCR technology and accessories may also affect viewing patterns. The growing range of viewing and video choices -- cable and subscription television, video games, computer attachments -- all increase viewers' options at any given moment and reduce the desirability of maintaining a library of old television shows and movies. These choices will be even greater as the VCR-owning population expands and creates additional demand for specialized VCR programming (e.g., educational and training materials, such as trial practice demonstrations and golf lessons; "made-for-video" entertainment specials).

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*/ Television Digest 21:50, December 14, 1981.

VII. THE IMPLIED EXEMPTION FOR HOME TAPING

Home audio taping and home video taping share several common characteristics, in terms of both consumer use and copyright concerns. This similarity led the district court and the appeals court in the Sony case to examine whether Congress, in creating an implied "exemption" from the copyright laws for home audio taping in 1971, intended also to create an "exemption" for home video taping. The district court ruled that Congress had meant to exempt all home-use recording, both audio and video, from liability for copyright infringement.[*/] The Ninth Circuit, however, found that the exemption was limited to audio taping only.[**/]

The Ninth Circuit concluded that Congress was not really thinking about video recording when it considered

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[*/] Universal City Studios v. Sony Corporation of America, 480 F. Supp 429, 445-46, (C.D.Cal. 1979).

[**/] Universal City Studios v. Sony Corporation of America, 659 F.2d 963, 966-69, (9th Cir. 1981).

protection for "home recording" in 1971. Regardless of the accuracy of that conclusion, the arguments that underpinned the implied audio exemption in 1971 -- that audio recording was so common that a royalty system would be unworkable; that the non-commercial nature of home recording placed it outside the scope of copyright protection; that any means used to prove infringement would intrude on people's privacy -- are equally applicable to the current video recording situation.

A. Legislative history of the implied exemption for home audio taping.

The "exemption" from the copyright laws for home audio taping is derived from the legislative debate surrounding the enactment of the Sound Recording Act of 1971 ("The Act"). The Act granted a limited copyright to producers and performers of published sound recordings, supplementing the existing protection extended only to the composers of the music.

While Congress was acting on audio copyrights, it used the opportunity to consider whether the dramatic expansion of home taping of sound recordings infringed the copyright laws. This problem was not specifically addressed in the Act, but was discussed in the legislative debate on the Act and in the House Judiciary Committee Report on the Act. The language that has been understood, and relied upon, as creating an implied audio exemption was in this Committee Report:

> Specifically, it is not the intention of the Committee to restrain the home recording,

> from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.*/

The hearings and floor debate on the Act indicate that issues of privacy, enforcement, and non-commercial use were of concern to Congress when they discussed the problems raised by home recording. Congress received expert testimony that the extent of home taping would make copyright controls impossible to enforce, and that enforcement would necessitate undesirable invasions of the privacy of the home.**/ In floor debate, Representative Kastenmeier, sponsor of the Sound Recording Act, assured a colleague that non-commercial home recording aimed at personal listening pleasure would not be considered a violation of the copyright laws:

> Mr. Kazen. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> Mr. Kastenmeier. Yes.

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*/ H.R. Rep. No. 487, 92d Cong., 1st Sess. 7, reprinted in [1971] U.S. Code Cong. & Admin. News 1566 at 1572.

**/ Barbara Ringer, Asst. Register of Copyrights, testified that ". . . This [home recording] is something you cannot control. You simply can't control it." Hearings on S.646 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22 (June 9 and 10, 1971).

> Mr. Kazen. In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> Mr. Kastenmeier. This is not included in the bill. I am glad the gentleman raises the point.*/

The policy questions raised in the legislative history that accompanied the origin of the audio exemption in 1971 are equally relevant to the current consideration of video recording. The answers given by Congress in 1971 to these questions are just as applicable to video recording in 1982.

B. Patterns and Effects of Home Audio Taping.

Surveys of consumers with audio tape equipment do not support the contention that the audio exemption, which for the past 10 years has provided protection for home taping, has had a detrimental effect on the commercial interests of audio copyright holders. Frequent taping of records or radio broadcasts is not common among households with tape recorders, and the effect, if any, of the availability of home taping on purchases of records and prerecorded tapes is unclear.

A 1979 United States Copyright Royalty Tribunal study of home audio taping**/ found the frequency of music taping among all those owning equipment to be "rather low," with less than half of the respondents having taped anything during the past year. Only 44 percent of those who tape music do so at least once a week, and only 7 percent tape more than 10 hours of music in an average month. Apparently, a very small group of enthusiasts does most of the total home taping.

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*/ 117 Cong. Rec. 34, 748 (1971).

**/ William R. Hamilton and Staff, "A Survey of Households with Tape Playback Equipment" (November 1979) ("Hamilton study").

The effects of home taping on purchases of prerecorded music are unclear. On the one hand, 70 per cent of respondents said they would have purchased the last record or prerecorded tape that they recorded if they had been unable to tape it. On the other hand, listeners were equally divided between those who said their purchases of prerecorded music had increased since they began taping (40 percent), and those who said their purchases had declined (40 percent).*/ The probable explanation is that about half of those who taped a record instead of buying it used the money they had saved to purchase a record that was not available to tape.

A study conducted by CBS Records, based on surveys of people buying blank tape in record stores, concluded that audio home taping costs the recording industry 20 per cent of its sales.**/ The study's conclusion, however, is based on the questionable and unsupported assumption that every record taped rather than purchased necessarily translates into a "lost" sale. It is instead quite possible, as noted above, that the money saved may be used to purchase other records or prerecorded tapes. As the CBS study itself indicates, 80 percent of blank tape buyers also purchase prerecorded music, while the Copyright Royalty Tribunal study confirms that the persons who most frequently tape music also purchase the most prerecorded music.[*] Moreover, the motivation most commonly cited for home taping was not saving money, but rather "personal convenience," particularly the assembling in one place of songs from different sources.

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*/ Hamilton study at 8.

**/ CBS Records Market Research, "Blank Tape Buyers" (Fall 1980).

A number of important factors other than home taping also affect record buying habits, including the cost of records, the amount of interest in "popular" music, the recording patterns of popular artists, and the physical quality of the recording. To the extent that home audio taping has affected record purchasing habits, the reasons for its impact on the record market do not automatically translate to the video recording situation.

C. Comparison of Home Audio Taping Patterns and Consumer Uses of VCRs

While home video taping is primarily for the purpose of "time-shifting,"[**] home audio taping is directed to a much greater extent toward building a "library" of tapes for later, repeated use. The many factors that make audio tape

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[*] Hamilton study at 7.

[**] See part VI on consumer use of VCRs.

"library building" desirable and feasible do not apply to video taping. Blank audio tapes are relatively inexpensive (a few dollars at most) as compared to blank videocassettes ($12-20). Much home audio taping consists of taping one own's records for the purpose of assembling a number of songs on one convenient tape. FM radio stations serve their listeners and assist home tapers by frequently playing entire uninterrupted albums. Finally, a major difference is simply that it is more enjoyable to listen to a song or album a great many times than it is to watch a movie over and over again.

In short, the audio taping exemption has not led to a massive substitution of home taping for record buying, and the evidence simply does not support an argument that audio taping has had a major effect on the fortunes of the record industry. It is even less likely that a video taping exemption would significantly harm the movie and television industries given the different patterns of consumers' use of audio as compared to video taping equipment.

VIII. COPYRIGHT COMPENSATION AND INDIVIDUAL PRIVACY

The October decision of the Ninth Circuit stimulated a flood of editorials, cartoons, articles, and letters to editors expressing surprise and opposition to the decision. Some of the comments have decried the decision's plain lack of common sense, and most have singled out the potential invasion of privacy for particular criticism. Many of the cartoons and articles have conjured a vision of "video police squads" invading the homes of VCR owners and dragging them away with their tapes of Monday Night Football, Mickey Mouse, or other "illegally" recorded programs.

While such squads are an obvious -- and humorous -- exaggeration, the decision, if not overturned by the Supreme Court or legislatively by Congress, does have a serious potential for invading the privacy of Americans who own VCRs. This potential arises from the methods likely to be used in determining whether and to what extent copyright infringement has occurred which should subject VCR manufacturers and distributors to remedial action, e.g., damages or restrictions on sales. Because the liability of manufacturers and distributors is dependent on the proof of infringing activity on the part of individual VCR owners, at least some of those individuals would have to be brought before a court to prove the copyright holder's case.*/

While to date the initial trial of the Sony case has involved only a very limited number of VCR owners, the courts have so far only addressed the legal issue of whether video recording of copyrighted programs is a copyright infringement. The larger question of how much infringing activity has occurred would require involvement of many more individuals, whether through actual in-court testimony about their recording habits, pre-trial depositions on the same subject, or court-sanctioned surveys of these habits. While the survey approach might seem relatively innocuous, the fact that the survey could be conducted with the official imprimatur of the court would add an important coercive pressure on individuals to participate. Further, defendants in these suits would undoubtedly want the opportunity to check the survey results, adding yet another opportunity for invasion of the VCR owner's privacy.

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*/ The fact that the copyright statute allows a court to award a fixed penalty per violation, without demonstration of the amount of harm to the coypright holder, does not solve the initial evidentiary problem of proving the existence and extent of the infringement of the copyright.

Once the fact of cognizable infringements has been proven, the court would be faced with the task of fashioning remedies to compensate the copyright holder for past infringements and either prevent or compensate for further infringement. The testimony of individuals and surveys of many more VCR owners would be used at that stage. Without extensive and firm evidence of the amount of infringing activity, a court would be hard pressed to set damages for past violations. It matters significantly, for example, whether 10, 20, or 50 percent of total VCR usage is for recording material which is subject to a copyright held by the particular plaintiff in a law suit. Such information is unavailable unless the recording habits of individual Americans are known.

Similarly, the possible remedies for future infringements generally involve analysis of individual activities. The only remedy that would not pose the problem is a total prohibition on the sale of VCRs and blank tapes, a "solution" not likely to please anyone. Even a fixed "royalty fee" paid at the time of purchase of the VCR or tape would involve periodic scrutiny of individual activity, in order to insure that the fee is set at an appropriate level.

One particularly frightening possible remedy would be the installation of a device on every VCR to monitor everything that is recorded, in order to set charges for recording of copyrighted material. Current technology would allow this to be done via instantaneous signals to a centrally located computer every time a VCR is turned on to record a broadcast signal. The computer would have complete records of the recording activity of every VCR owner. (Perhaps the specter of the video police squad is not all that exaggerated.)

This review of the actions necessary to make adequate proof to a court to demonstrate the initial proposition that infringement has occurred, and then to provide information on the appropriate remedy, suggests that the Ninth Circuit's decision is an invitation for inquiring into the personal habits of Americans in the privacy of their own homes. Such inquiries are antithetical to our traditional view of our homes as sanctuaries against outside intrusions. The right of privacy -- the "sanctity of a man's home and the privacies of life"[*] -- is a fundamental value in our society, recognized repeatedly by the Supreme Court.*/ In the VCR situation, the privacy issue presented is whether the right to be left alone in the privacy of our own homes needs to be abrogated in order to provide an economic benefit to the holders of copyrights. In light of the availability of other, non-intrusive methods of compensating copyright holders for the use of their property,**/ the privacy concerns are all the more compelling.

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[*] Griswold v. Connecticut, 381 U.S. 479, 484 (1965), quoting from Boyd v. U.S., 116 U.S. 616, 630.

IX. THE EXPERIENCE OF OTHER COUNTRIES

More than 30 countries have enacted exemptions for audio and video home taping as part of their copyright laws.***/ These countries have all concluded that their citizens should be able to tape in their homes without liability for copyright infringement.

Most foreign countries have copyright statutes that are similar in structure and principle to the United States copyright laws.****/ The same basic rights accorded to copyright owners in the U.S. -- exclusive rights to reproduction, adaptation, distribution, and performance of their work -- are also protected throughout most of the world. The European countries in particular, like the United States, grant copyright owners certain broad exclusive rights which are then limited by various exceptions.[*/]

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*/ Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, supra.

**/ See the discussion of broadcast licensing in part V.A.

***/ World Intellectual Property Organization, Copyright Laws and Treaties of the World. Countries with home taping exemptions include: Austria, Algeria, Brazil, Czechoslovakia, Denmark, Egypt, Finland, France, East Germany, Hungary, Iceland, Ivory Coast, Japan, Kenya, Liberia, Libya, Liechtenstein, Malawi, Malta, Mexico, Morocco, Netherlands, Norway, Peru, Philippines, Poland, Senegal, South Africa, Soviet Union, Sweden, Switzerland, Tunisia, West Germany, and Zambia.

****/ Id.; 3 Nimmer on Copyright §17.09 (1981); "Law Survey," Copyright (September-December 1978).

Given the similarity between the copyright laws of the United States and European countries, it is significant that most European countries have enacted exemptions for single copies of copyrighted works made for personal use that effectively cover audio and video home taping. In the context of European copyright laws, the enactment of these exemptions for home taping reflects a conscious decision to limit the exclusive rights of copyright owners in favor of the public's interest in access to copyrighted works.

Furthermore, almost all European countries have refused to establish a royalty system for home taping. These decisions reflect a belief either that home taping is not copyright infringement, or that a royalty system is not a necessary or appropriate means of compensating copyright owners for home taping use. Only West Germany, Norway, and Austria have chosen to establish copyright royalty systems based on a levy or tax on recording equipment.

[*/] *Id*. An example of such an exemption commonly seen in European copyright laws is reproductions by a library or archive for scholarly use.

It is premature to discuss the Austrian or Norwegian royalty systems, which went into effect only recently. The German royalty system, however, has been in effect since 1966. Its 15-year history illustrates some of the problems of collecting royalties from equipment manufacturers and importers and distributing royalties to copyright holders that can hamper a copyright royalty system.

The German royalty system entitles audio and video copyright holders to a maximum of five percent of the factory sales value of recording equipment. A central agency collects the levy from manufacturers and importers of such equipment, and distributes it to royalty groups (e.g., a writers' group), that in turn distribute the royalties to their members. This royalty system, however, has reportedly encountered serious administrative difficulties.*/ For example, problems have arisen in valuing the recording equipment for purposes of the copyright levy, ensuring that imported equipment does not slip through the cracks in the system, and distributing the proceeds of the levy to copyright owners.

As a result of such problems, German manufacturers of video equipment and the royalty collection groups are enmeshed in an arbitration proceeding that has completely halted the distribution of video royalties since 1977.[*/] Even though the royalty system as formulated in the 1965 legislation appeared to be a workable scheme, it has not been able to adapt to the ever-changing technology of home taping.[**/] The video taping revolution of the past few years has outstripped the collection and distribution capacities of the system.

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*/ "German Taping Royalties," Television Digest, November 30, 1981 at 10 (Some of the information reported in this article is based on the observations of Norman Alterman, Vice-President, Motion Picture Export Association of America.). see also Gary Stock, "Behind the Betamax Case," Video, January 1982 at 107.

It is reported that the German government is considering imposing an additional royalty fee of 10 percent on blank tape, apparently to compensate for the shortfall in the present levy on equipment.[***/] In response to such proposals for a tape levy, BASF, Germany's largest tape manufacturer, has publicly charged that the inability of the royalty collection groups to recover adequate royalties for their members through the equipment tax is a result of inefficient administration, rather than any basic flaw in the current royalty system.[****/] These problems in Germany illustrate a danger created by the enactment of a massive new royalty system. The complex bureaucratic machinery necessary for collection and distribution of royalties can become so

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[*/] Id. Some of the royalty systems administered by the Copyright Royalty Tribunal in the United States have also been halted due to disputes over a variety of problems, including application of statutory standards.

[**/] Id.

[***/] Id.

[****/] "Germans Fire Away on Tax," Billboard, September 12, 1981 at 1.

bogged down by disputes and challenges over whether enough money is collected and how it is distributed that the whole system grinds to a halt. The experience of the U.S. Copyright Royalty Tribunal -- even in its brief existence -- echoes the German experience.

The copyright system in Great Britain has recently been the scene of considerable controversy surrounding the possible establishment of a royalty system for home taping.*/ In July 1981, the British Secretary of State for Trade released a comprehensive "Green Paper" on reform of the copyright laws which included an analysis of the desirability of a royalty system to cover home taping.**/ Although the Green Paper started from the assumption that home recording is technically copyright infringement, it concluded that a royalty system is not warranted because video recording does not seriously impair the value of copyrighted material. It found no evidence that video recording harms the commercial interests of video copyright holders, since time-shifting is the primary use of VCRs and library-building is uncommon.

Thus, many other countries have consciously chosen not to adopt copyright royalty systems for home video recording, and two of the countries that have looked closely at such systems -- Great Britain and West Germany -- have either identified or experienced significant implementation problems. Germany's experience and Great Britain's exhaustive study call into question the efficiency and fairness -- to copyright holders and to recording equipment manufacturers -- of any royalty system based on a levy on recording equipment or tapes. It is against this backdrop that current legislative proposals calling for copyright royalties on recording equipment or blank video tape should be evaluated.

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*/ "U.K. Blank Tape Firms Unite . . .," Billboard June 13, 1981 at 1.

**/ Department of Trade, "Reform of the Law Relating to Copyright, Designs and Performers' Protection."

HOME VCR & COPYRIGHT

Compendium of Arguments in Support of Legislation to Exempt from Copyright Infringement Home Recording of TV Programs for Private Viewing

(with executive summary)

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HOME VCR AND COPYRIGHT

EXECUTIVE SUMMARY

In response to the 9th Circuit's decision in the so-called "Betamax" case, two types of bills have been introduced in Congress. The first would exempt home videotaping for private noncommercial viewing from copyright infringement. The second would impose a compulsory royalty payable to copyright holders on home video cassette recorders ("home VCRs") and videotapes, payable in effect by all consumers engaged in any videotaping irrespective of the material taped.

The basic issue in the controversy is whether the public should be able to receive and view TV programs at their convenience within the privacy of their homes with home VCRs without being burdened with additional charges. Contrary to the claim made by some that the benefits of home VCRs are realized at the expense of the creative community, the facts on home VCR usage, the economics of the television industry, and the policies underlying the Copyright Act show that the exemption, rather than the royalty scheme, should be enacted.

1. Home VCRs augment the existing scheme of broadcast reception by allowing viewers more flexible access to television programs - particularly children's or public affairs programs often not available at convenient times for many viewers.

The home VCR and the household television set are similar in that both receive TV programs. They differ in that the household TV set displays the TV program for viewing simultaneously with the reception; in contrast, the home VCR receives the TV program by recording it on tape for play-back through the TV set for viewing at a later time. Surveys on home VCR usage clearly show that time-shifting of TV programs is the predominant use. This capability provides such benefits as affording parents more control over selection and scheduling of programs for their children, and enabling a night shift worker to enjoy prime time programs.

An average of only about 10% of the total viewing time of TV programs by a VCR owner is attributable to viewing home recorded tapes, and the balance remains to be real-time viewing. This pattern of use is not likely to change drastically with further market penetration of home VCRs since viewers with the greatest interest in videorecording are likely to have been early purchasers of home VCRs. Whatever impact taping of TV programs may have, it is limited to this very narrow scope.

2. Librarying of television programming is not a significant phenomenon.

Librarying of television programs recorded is not a significant phenomenon according to surveys. With the rapid expansion of the prerecorded cassette rental market and of pay television services, which provide unedited, uninterrupted programs at a lower cost than the cost of blank tapes, it will become increasingly unattractive to keep programs recorded off-the-air for a permanent collection. The economic effect of librarying is negligible, and as described below, copyright holders are in a position to obtain compensation through existing market mechanisms.

3. Copyright holders are compensated for home recording through existing market mechanisms.

Of critical importance is that the market already compensates copyright holders for home videotaping. The programs broadcast by commercial TV stations are in most cases licensed by copyright holders for a fee. In opting to exploit commercial TV stations, copyright holders have voluntarily agreed that the payments made by the TV stations for the right to make the program available for mass viewing will be related to the amounts that advertisers are willing to pay for viewer exposures to the advertisements. The amounts paid for advertising are, of course, passed on to consumers. In the negotiations between copyright holders and the TV stations, measurement of viewing audiences by rating services plays a central role. The rating services already include home VCR usage in the rating points and treat home VCR viewing or recording in the same manner as real-time viewing.

4. Commercial deletion by VCR owners is no more prevalent than commercial avoidance by viewers of real-time television broadcasts.

Emphasis by the motion picture industry on commercial skipping by home VCR viewers distorts the reality of commercial TV viewing. There is simply no reason to regard commercial avoidance by home VCR viewers as any different from that done by real time viewers. When Media Statistics asked VCR owners in 1981, "Do you ever erase or skip commercials while recording TV programs?", 86.8% said "Yes." But if real-time viewers were asked whether they _ever_ skipped commercials while watching a broadcast, no doubt 100% would have to say, "Yes." In fact, home VCRs increase audience size of TV programs (75% to 80% of the total programs taped are taped either unattended with a timer or from another channel) and, consequently, there is net increase in commercial exposure. As earlier described, rating services treat VCR viewing in the same manner as real-time viewing, and advertisers are willing to pay for this increased exposure.

5. Home VCRs are creating new revenues and new business opportunities for copyright holders and broadcasters and thus promote the copyright scheme's objective of rewarding creative activity.

Another important aspect of home VCR technology is that it has created a new major source of revenue for copyright holders in the form of prerecorded video casette market. According to analysts, this new market is already generating as much revenue for major movie studios as their licensing of programs to network television, with only about five percent market penetration by home VCRs. This market offers new opportunities also to aspiring new and independent artists. New opportunities for broadcasters are also created because of the flexibility of program scheduling made possible by home VCRs.

The creation of this new alternative market works to strengthen copyright holders' bargaining leverage in their license negotiations with TV stations, which is already strong because of their basic right to refuse license. This position on the part of the copyright holders should enable them to negotiate additional compensation for home VCR viewing.

6. A compulsorv license fee imposed on VCRs or blank tape is unnecessary and inequitable, would require consumers to pay twice for home recording, and would thwart the emergence of new markets and business opportunities.

In view of the above, the proposed statutory royalty scheme is, in effect, nothing more than an attempt to create a private excise tax, a windfall profit for the motion picture industry at the expense of consumers in addition to all of the benefits that the motion picture industry will continue to enjoy in the marketplace. Such a scheme will result in double payment by consumers, since they are already paying in the marketplace for the right to view TV programs, and the royalty will be passed on to the consumer either in the form of increased price or delay in lowering the price to make home VCRs affordable for more people. Such a scheme will create not only an unnecessary and impractical regulatory bureaucracy but also inequity and discrimination since there is no way that a statutory royalty scheme can reflect the varied uses to which home VCRs are put by an individual, such as making home video movies, or taping programs that either are uncopyrighted or are available for home taping by consent of their owners.

> 7. A blanket exemption for home recording balances the dual objective of the copyright scheme of rewarding creative endeavor and encouraging public access by (1) preserving the copyright holder's basic right to control the distribution of programming over commercial or pay television at licensing fees negotiated to reflect home recording and by (2) facilitating the widest possible dissemination of ideas and information to the public.

It has been recognized by the Courts that copyright protection inherently involves a balancing of competing interests -- protection of the copyright holder's ability to control access to his work versus wide dissemination of ideas to the public. Home VCR technology clearly enhances wider dissemination of ideas to the public, and such benefit is not being realized at the expense of copyright holders. Accordingly, sound public policy would be served by an adoption of legislation to exempt home video recording of TV programs for private noncommercial viewing from copyright infringement. The Supreme Court has held that "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."

HOME VCR AND COPYRIGHT

COMPENDIUM OF ARGUMENTS IN SUPPORT OF LEGISLATION TO EXEMPT FROM COPYRIGHT INFRINGEMENT HOME RECORDING OF TV PROGRAMS FOR PRIVATE VIEWING

I Introduction

In response to the Ninth Circuit's decision of October 19, 1981 in the so-called Betamax case, two types of bills have been introduced in Congress. The first would exempt home videotaping for private noncommercial viewing from claims of copyright infringement. The second would impose a compulsory royalty on home video cassette recorders ("home VCRs") and videotapes that would, in effect, result in a payment by all consumers engaged in any videotaping to copyright holders.[1]

The basic issue in the controversy over home videotaping of TV programs is whether the public should be able to receive and view TV programs at their convenience within the privacy of their homes with home VCRs without being burdened with additional charges. Contrary to the claim made by some that the benefits of home VCRs are being realized at the expense of the creative community, the facts concerning VCR usage, the economics of the television industry, and the policies underlying the Copyright Act show that the exemption, rather than the royalty scheme, should be enacted.

Home VCR technology offers substantial benefits not only to the public but also to the motion picture industry and TV broadcasters. Prerecorded cassettes offer the motion picture industry a new way to reach audiences and thus to increase revenues. Home videorecording provides a way to increase the size of television audiences and thus the amounts paid for broadcast rights over commercial and pay television. The motion picture industry already is benefitting from these new sources of revenues.

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[1] Copies of representative pending bills are attached as Appendix 1.

Of critical importance is that the market already compensates copyright holders for home videotaping; hence, a compulsory royalty would unnecessarily compensate copyright holders a second time. Such unnecessary compensation would hinder the widespread dissemination of a new technology that promises great benefits for consumers, as well as for the creative community.

Historically, there has been a clear interdependency between distribution technologies and software production and between manufacturers of distribution technologies and creators of programming. It is thus neither farsighted for the motion picture industry nor sound public policy to see the new VCR distribution technology as essentially competitive with, or in an adversary relationship to, the interests of creators of programming. Efforts to tax, or otherwise unnecessarily burden, a new technology for the benefit of program creators will only impede the natural economic synergies now at work in the market.

II. Facts on Home VCR Usage:

Facts on home VCR usage show that among the varied uses to which home VCRs are put, those relating to TV programs further the purpose for which the TV programs are delivered.

A. What is a Home VCR?

1. Functions.

a. The home VCR is a video tape recorder designed primarily for use by the general public in the home to record and play back within the home audiovisual information (a portable VCR with a camera can be used outside the home to make movies). Home VCRs use magnetic tape in a cassette, as distinguished from reel-to-reel video tape recorders.

b. A television receiver is used as a display device.

c. With a video camera, home video movies can be made.

d. Prerecorded video cassettes sold or rented in the market can be played on a VCR.

e. With a built-in tuner or a separate television tuner available in the market, television programs (programs being viewed or programs on another channel) can be recorded for later viewing.

f. With a timer, a recording can be made at a specified time, even if the user is at work, asleep, or otherwise unavailable.

g. The cassette tape can be used many times by recording over a prior recording.

h. A home VCR can record one program on one cassette at a time as the program is broadcast, and cannot mass reproduce the material recorded. A single home VCR cannot make any copies of a videorecording.

i. Many home VCRs have a pause switch which can stop a recording temporarily, and a fast-forward switch which can scan at an accelerated speed portions of the program during playback.

j. The home VCR and the household television set are similar in that both receive TV programs. They are different in that the household TV set displays ("performs") the TV program on its picture tube for viewing simultaneously with the reception; in contrast, the home VCR receives the TV program by recording it on tape for play-back through the TV set for viewing at a later time.

2. History.

   a. Video tape recording technology was developed in the '50's.

   b. As early as 1961, the Register of Copyright reported to Congress that home videotaping should be exempt from claims of copyright infringement: "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."

   c. Marketing in the U.S. of video tape recorders for home use began in 1965, prior to the introduction of audio cassette tape recorders.

   d. Video cassette tape was introduced in 1969.

   e. The Sound Recording Act was enacted in 1971.

   f. The current generation of home VCRs was introduced in 1975.

   g. The current Copyright Act was enacted in 1976.

B. How are Home VCRs Being Used?

1. Scope of VCR viewing.

An average of only about 10% of the total viewing time of TV programs by a VCR owner is attributable to viewing home recorded tapes (Appendix 2), and the balance remains to be real-time viewing. This pattern of use is not likely to change drastically with further market penetration of home VCRs since viewers with the greatest interest in videorecording are likely to have been early purchasers of home VCRs. Whatever impact taping of TV programs may have, it is limited to this very narrow scope.

2. Primary use is for time-shifting.

Surveys of home VCR usage show that time-shifting. that is, recording of TV programs for viewing at a later time and then reusing the tape. is the primary use (Appendix 3). By being able to record a TV program while at work, or a program on another channel, home VCR owners are able to view programs they would otherwise miss. Time-shift capability provides such benefits as affording parents more control over selection and scheduling of TV programs for their children, and a night shift worker the opportunity to watch prime time programs.

3. Expansion of TV audience.

a. The VCR audience for programs taped either unattended or from a channel other than the channel being viewed (which constitute 75% to 80% of the total TV programs taped) is an audience that would not have been reached absent home VCRs (Appendix 4). The additional audience resulting from taping is part of the total audience measured by the rating services (see IV.A.2.).

b. Thus, home VCRs enhance public access to programs broadcast over the public airwaves, and promote the efficient use of a limited public resource.

4. No significant library building.

   a. Data do not support the claim that VCR owners are building extensive tape libraries. Survey data suggest that the median viewer owns fewer than 15 video cassettes and that only about half of these are used for home recordings that are being kept (Appendix 5).

   b. Data showing that some viewers retain some home recordings do not tell us how long these recordings are kept or how often they are viewed.

   c. With the rapidly expanding availability of prerecorded tape for rent (some rental outlets even offer delivery service), library building of home taped programs, particularly movies, will become increasingly unattractive for many viewers because of the cost of blank tapes.

   d. With the rapid expansion of pay-TV services that deliver unedited, uninterrupted movies, those who still want to make their own tapes will shift from off-the-air to pay-TV. Home taping from pay-TV movies will pose no problem for copyright owners because subscription fees will be adjusted to take account of home taping, as described below (see III.A.2). Moreover, the incentive for librarying from pay services may be quite limited. Motion pictures are often made available several times a day during the month or so period they are available on a pay service. Many movies are then reshown several months later along with new releases. Thus, motion picture producers have already agreed to release patterns on pay services which involve multiple exposures of a movie to viewers. To the extent that taping of movies on pay services does occur, it may often be for traditional time-shift purposes.

5. Increased exposure to advertisements.

Because home VCRs allow more viewers to see television programming, home VCRs also increase the exposure of viewers to commercial messages. Both VCR viewers and real-time viewers sometimes skip commercials. When Media Statistics asked VCR owners in 1981, "Do you ever erase or skip commercials while recording TV programs?", 86.8% said "Yes." (Since commercials can be erased while recording only when the commercials are being viewed, which is only about 25% of the total recording of TV programs, those who answered "yes" to this question constitute only about 20% of the total people recording TV programs.) If real-time viewers were asked whether they ever skipped commercials while watching a broadcast, no doubt 100% would have to say, "Yes." There is simply no evidence that VCR viewers skip more commercials than real-time viewers.

III. TV Broadcasting and Copyrights:

In order to evaluate taping of TV programs in the context of copyrights, it is necessary to understand the nature of the medium that the motion picture companies voluntarily chose to exploit, and the mechanism through which programs are delivered to the home. It is clear that whether the medium is advertiser-supported, as is the case with commercial TV, or viewer-supported, as is the case with pay and cable TV services, the viewer currently pays, even if indirectly, for the right both to view and to videotape programs in their homes, and program suppliers can and do receive compensation for their programs. Accordingly, home taping of programs for the purpose of private viewing does not use a copyright holder's property without compensation. Such taping should not constitute copyright infringement.

A. Nature of TV Media.

1. Commercial TV.

   a. Use of public airwaves:

      i) Commercial TV is licensed to use public airwaves for the purposes of furthering "the public interest, convenience, and necessity" (Communications Act of 1934, as amended, 47 U.S.C. § 309).

      ii) Free off-the-air television is broadcast over public airwaves for mass viewing and is lawfully received and viewed by the recipients, because it is broadcast for the use of the general public (see 47 U.S.C. §§ 153(o), 605).

   b. Advertiser-supported media:

      i) The commercial TV broadcast business is structured on the basis of two interrelated but separate transactions, one between the program suppliers and the TV broadcasters, and another between the advertisers and the TV broadcasters. There is no participation by the general public in either of the two transactions that ultimately determine the value of the programs in this market.

ii) The revenue of commercial TV broadcasters comes primarily from advertisers.

iii) Advertising costs are factored into the prices that consumers pay to purchase advertised products or services.

iv) Accordingly, on the one hand, the consumer is ultimately bearing the cost of maintaining commercial TV services, including the cost of programming, _whether or not a specific program (or advertisement) is viewed by him or her_; on the other hand, the consumer is free to view any number of programs broadcast without additional charge.

v) Thus, a person who watches TV an average of ten hours a day pays no more for the programs than a person who watches an average of one hour a day. Nor does a household owning four TV sets pay more for the additional programs received than a household with only one TV set.

c. The price of an advertising spot on commercial

TV is determined primarily, on the one hand, by TV broadcasters' desire to earn a profit and by the supply of television advertising spots and, on the other hand, by the value that advertisers are willing to place on commercial television advertising compared to other advertising media. These supply and demand factors for advertising spots determine the actual price. The cost of producing programs for TV broadcasting is a factor in determining the prices of advertising spots.

d. The total revenue earned by a program depends, among other factors, on an estimation as to how many viewers see the program and on how much advertisers are willing to pay per viewer. The value of the programming to viewers themselves is of secondary importance.

2. Pay/Cable TV.

   a. These media are viewer-supported. The viewer pays a subscription fee to have programs delivered to his home.

   b. The rights of the viewer as to what he can or cannot do, and what price he must pay for such services. are regulated by contract between the viewer and the pay-TV service.

   c. Additional compensation for taping of programs can be realized, if warranted. by adjustment of subscription fees. Viewers will be willing to pay more for pay-TV because of the ability to videotape.

B. License by Copyright Owners to Commercial TV Stations.

1. One market for copyright owners.

   Technological development of the TV media created new markets for copyright owners.

2. Voluntary license.

   Despite the initial outcry that television would destroy the movie industry, copyright owners chose to exploit this market, knowing the nature of this medium, as described above.

   a. They know that their copyrighted material will be broadcast for mass viewing and that the actual amount of viewing cannot be controlled.

   b. They know that a copyright fee for each viewing will not be directly charged to the actual viewer no matter how many programs the viewer may view.

   c. They have voluntarily agreed that the payments made by the networks, which are related to the amounts that advertisers are willing to pay for viewer exposures, are sufficient compensation for viewers gaining the right to see their works.

3. Exercise of control

   Since copyright holders are not required to license programs for broadcasting, they retain control over the price and the timing of the release of a motion picture for broadcast distribution. The release of a motion picture for broadcast distribution is now normally several years after the movie has been made available for theatrical or pay TV distribution. Increasingly, prerecorded cassettes of a motion picture are released at the time of theatrical distribution, or shortly thereafter, and before release to pay TV or broadcast television. The ability of a producer to withhold programming from broadcasters and to license it to others, including often to alternative or competitive distribution media, enables the producer to maximize the price charged for broadcast rights. The decision of Walt Disney Productions to limit distribution of some of its films to theaters and not to offer them on television or on video cassettes is an excellent illustration of the fact that producers will sometimes refuse to sell their products for broadcast use to maximize revenues.

4. Partial transfer of control.

   In licensing TV stations to broadcast the program, however, copyright owners under a typical license contract transfer control over when the program will be broadcast, and thus voluntarily relinquish control over when the end user of the program will view the program.

5. Compensation.

   The license fee is not mechanically determined by actual audience size, but existing market mechanisms afford the copyright holder a clear cut and fully adequate mechanism for obtaining compensation for additional viewing that might occur as a result of off-the-air recording (see IV.A.2).

IV. Economics of Home VCR Usage:

The control that a copyright holder retains over both price and timing of the release of a picture to the broadcast medium leaves producers free to make prudent business judgments about the distribution strategy most likely to maximize revenues from all distribution channels -- pay TV or prerecorded cassettes as well as broadcast television.

The use of the commercial broadcast medium by copyright holders historically has involved a strategy of maximizing revenues from a medium in which compensation is obtained not by the direct payment by viewers and controlled access but by indirect payments for such viewing by advertisers and by the widest possible access. Reception and viewing of broadcast programming with home VCRs is functionally the same as reception off-the-air. By increasing the size of the audience, home VCRs make it possible for copyright holders to obtain additional compensation in license negotiations with broadcasters.

As described earlier (III.B.3), home VCRs as well as pay TV have also become a significant new market for copyright holders' programming. The existence of these alternative outlets has also enhanced producers' bargaining leverage to obtain their license fee demands for programming to be released over the major networks. Before the spread of pay cable and home VCRs, producers complained about the networks' monopsonistic power -- about the absence of alternative outlets to the three major networks. Thus, producers have generally favored increasing competition to the existing networks.

Home VCRs have become such an alternative outlet for producers in the form of a rapidly expanding prerecorded cassette market; but, the creation of this new market has depended significantly on the home VCR's recording ability. This capability has contributed very substantially to consumers' greater willingness to acquire home VCRs than playback-only video devices.

Thus, home VCRs have had a highly stimulative and beneficial effect on motion picture revenues both by increasing producers' bargaining leverage with the networks and thus their share of advertiser revenues passed back to copyright holders and by creating new markets. The income performers and artists receive from programs broadcast on television depends on their contracts negotiated with the movie studios. If their compensation is linked to the revenue earned by the studios, the performers and artists should also receive their share of the increased revenue of the studios made possible by home VCRs. Copyright holders' allegations of adverse economic effects of home VCRs thus are wholly unsubstantiated.

A. Home Videotaping Increases the Revenue of Copyright Holders.

1. Increase in TV audience size.

Surveys show that about 80% of home VCR owners watch the same amount of, or more, television programs as compared with the amount of television watched prior to purchase of a home VCR, so that home VCRs increase audience size (Appendix 6).

2. Market mechanism for compensation from free commercial TV stations.

The existing market mechanism can and does provide for adequate compensation to copyright owners. Program costs to broadcasters are determined through negotiation between broadcasters and copyright holders. The measurement of viewing audiences by rating services plays a central role in these negotiations. The rating services already include VCR viewing in the measured audiences of programs (Appendix 7). The amount advertisers pay depends on this measured audience.

a) License fees negotiated between broadcasters and copyright holders are determined by a number of factors, the most important of which is the expected audience rating. Both copyright holders and broadcasters have access to the rating of motion pictures previously shown on network television as well as to the data on how well the movies have done in the other distribution media. Both producers and broadcasters are also aware of the likely consequences in terms of potential audience and revenues of releasing a picture on different days, in different network time slots, and on different networks. The copyright holder's demand for a license fee is predicated upon its estimates of the motion picture's likely audience and its value to a network when released.

b) Moreover, producers are well aware of the factors influencing the revenues likely to accrue to a network from a particular program's release. The motion picture companies obviously know that taping of a particular particular picture raises the total audience figures used by advertisers. Taping figures are now included in audience surveys and are not differentiated from real-time viewing. Producers negotiate with networks with an awareness that a network can earn revenues from all the measured viewing including taping of a program.

3. Increase in ad exposure.

Advertisers are willing to pay for VCR viewing because there is a substantial increase in TV audience size and consequent increase in viewer exposure to advertising through home VCR viewing.

a. Commercial skipping while taping can be done effectively only if the program is watched while it is taped:

   i) Taping the program being viewed constitutes only about 25% of all home videotaping (Appendix 4).

   ii) Those who skip commercials while taping see the commercial, more attentively than direct viewers.

b. Commercial skipping while VCR viewing:

   i) A recent survey shows that 45.2% of VCR owners do not often fast forward through commercials (Media Statistics, "3rd Annual Diary Study of VCR Homes," Fall 1981).

   ii) With many VCRs, viewers who fast forward through commercials are still exposed to the commercial message. They see an accelerated picture while fast-forwarding, and they must watch that picture in order to know when to return to normal viewing of the recording.

   iii) For both reasons, viewing of home video recordings does increase exposures to advertisers' messages.

c. Both videotape viewers and broadcast viewers skip commercials, and there is no evidence that videotape viewers are exposed to a smaller proportion of commercial messages. The rating services treat VCR recording and viewing in the same manner as real-time viewing.

4. Creation of a new market for copyrighted material

Besides the additional revenue generated by virtue of the expanded television audience described above, the home VCR industry has created a fast-growing prerecorded video cassette market that has already become a major source of revenue for the motion picture industry. Movie studios already appear to earn as much from prerecorded video cassettes as from licensing films to network television, with only five percent market penetration by home VCRs. "Hollywood's Hidden Millions", New York Times, January 20, 1982, D1, D4 (see Appendix 8).

5. New opportunities.

This market offers new opportunities to aspiring new and independent artists, because of the relatively low cost of producing programs with video technology, and the relative ease of entry into the market. The small, independent producers will be one of the beneficiaries of the wide dissemination of home VCRs. Such producers will be able to sell prerecorded cassettes without ever having their work broadcast over the public airwaves or shown at theaters. Their programs will not require the broad appeal necessary to interest a television station or advertisers. Of course, the public will benefit from a greater variety of programming for home viewing than has heretofore been available from the major studios.

6. Effect on pay-TV services.

Subscription revenues for pay TV services will be increased by home videotaping. More viewers will be willing to subscribe because the ability to videotape will make the service more valuable. Viewers will be willing to pay more for pay-TV because of the ability to videotape. Program producers will capture some of this additional revenue by negotiating higher license fees for pay services. The impact on these license fees may not be great, however, because the number of repeat showings of movies released on pay services may reduce significantly viewers' desire to library movies (see II.B.4.d).

B. Home VCR Usage Does Not Have Any Adverse Economic Impact on Program Suppliers.

1. Programs not viewed.

In some cases the ability to time shift programs with home VCRs may allow viewers to substitute programs they enjoy more for programs they enjoy less. Copyright owners, however, cannot seek compensation just because VCR viewing substitutes for viewing of other broadcast programs.

a. Copyright owners have no right to control performance of copyrighted material in the privacy of the home. Copyright owners have exclusive control only over public performance of their material [17 U.S.C. §106(4)].

b. **Copyright owners cannot seek compensation for copyrighted material not viewed. Copyright owners cannot force people to watch other programs. Changes in viewing habits brought about by home VCR cannot be distinguished from that caused by games, books, movies, sports, and other interests of the potential viewer.**

2. Impact of libraries.

Libraries of programs recorded from commercial television are not extensive enough to have any substantial impact on subsequent showings of such programs or compensation for them (see II.B.4). Copyright holders are in any event free to negotiate with broadcasters for compensation reflecting the full extent of off-the-air recording that is occurring. Detailed ratings information about the frequency of use of libraried programs is not a prerequisite to efforts by producers to obtain full compensation since broadcasters and copyright holders can negotiate based on estimates of such VCR usage. As outlined elsewhere (see introduction to IV), the existence of home VCRs -- and other new outlets such as pay TV -- have increased the bargaining leverage of producers with the major networks and the likelihood that producers' demands for a portion of the network advertising revenues will be met.

3. Impact on rebroadcasts.

If audiences for rebroadcasts are smaller because time-shifting allows more viewers to see the original broadcast, there will be no adverse effect on program producer revenues since larger revenue will have been realized from VCR viewing at the time of first broadcast. Taping of the first broadcast is counted by the rating services (see IV.A.2).

4. Effects on the prerecorded video cassette market.

   a. Copyright owners cannot claim damage to the prerecorded video cassette business, since this is a market that would not exist without home VCRs.

   b. In any event, the effect will be small:

      i) Movie studios protect the market for prerecorded cassettes by delaying the broadcasts of movies on both pay and commercial television.

      ii) Much of the home taping that does occur will be from pay services. Program producers can readily negotiate licensing agreements securing compensation for this home recording (see II.A.2).

V. Exemption Bill Without Royalty:

It is evident that home VCRs offer television broadcasters and the motion picture industry substantial benefits and opportunities to increase revenues. More importantly, it is evident that the benefits enjoyed by home VCR users are well within the original purpose for which TV programs are paid for and delivered, and thus home taping of such programs should be recognized as beyond the reach of the copyright holders' monopoly. While interpretation of current laws as they apply to off-the-air taping of copyrighted television programs is being contested in court, legislative measures to clarify that home taping of television programs for private viewing does not constitute copyright infringement would remove the cloud of uncertainty over this issue.

A. An Exemption Bill Would Be in Line with the Copyright Scheme.

1. Adoption of the exemption for home recording of copyrighted materials for private noncommercial viewing would serve the policies of the copyright laws and the First Amendment and would prevent copyright holders from exercising monopolistic powers beyond the intent of the copyright scheme.

2. According to Article I. §8 of the U.S. Constitution. the copyright scheme was created "to promote the Progress of Science and useful Arts, by securing for limited Times for Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

3. In order to achieve this constitutional goal, the Copyright Act was enacted by Congress; it creates a kind of property that copyright owners can market to generate revenue as an incentive for copyright owners to make their works publicly available.

    a. Copyright protection inherently involves a balancing of competing interests -- protection of the copyright holder's ability to control distribution of his work versus wide dissemination of ideas to the public. The Supreme Court has stated: "The limited scope of the copyright holder s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts". Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (footnotes omitted).

b. Excessive pursuit of the copyright holder's interests may severely hinder full and efficient dissemination of information to the public.

c. The Supreme Court has recognized that the First Amendment necessarily protects the right to receive communications. Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 754-57 (1976). The Supreme Court has recognized in cases involving the First Amendment's applicability to broadcasting that the interest of the public in receiving information is paramount to the interests of disseminators of programming. Red Lion Broadcast Company v. Federal Communications Commission, 395 U.S. 367, 390 (1969).

4. The copyright scheme was never intended to provide any guarantee of actual profit to copyright owners. In order to generate revenue, copyright owners must exploit the available market within the rules of a free economic system. Copyright owners must meet the challenges of competition, as

well as changes in market conditions, just as other businesses do.

a. Copyright statutes have been recognized as trade regulation laws ever since the Statute of Anne was adopted in the early eighteenth century. Copyrights are monopolies established and regulated by Congress for the benefit of the public.

b. In the history of copyright and antitrust law, there have been repeated attempts by the motion picture industry to extend its copyright monopolies in an effort to control dissemination of information beyond the bounds of legitimate competition. These efforts have been particularly aimed at controlling the means of distribution of copyrighted material to the detriment of the public. The Department of Justice has, for example, blocked a joint venture between producers and distributors to prevent the control of distribution outlets for motion pictures by the producers of the materials. United States v. Columbia Industries, Inc., 507 F. Supp. 412 (S.D.N.Y. 1980). See also United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

c. If a copyright holder's exclusive rights over his work were unlimited, his drive to maximize his profits could actually limit the access of much of the public to his work, and could limit technological innovation and competition in the marketplace. The Supreme Court has repeatedly recognized the ultimate purposes of the copyright laws: "The sole interest of the

United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors". Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

5. Technological innovation, while changing existing market conditions, has provided new markets for copyright owners. The advent of the television system was one such example, which the motion picture industry has chosen to exploit. Likewise, home VCR technology has also created a new market for the motion picture industry in the form of the prerecorded cassette market.

6. New opportunities for broadcasters are created also because of the flexibility of program scheduling made possible by home VCRs. It is not unlikely in the future that broadcasting spectrum and facilities -- now idle in the hours between midnight and sunrise -- could be used to distribute audio and video programming to home VCRs which would automatically receive and decode scrambled signals. Using broadcast facilities in this way could open new revenue sources for many conventional commercial broadcasters and reduce producers' costs of distributing prerecorded material.

7. Given (1) the purpose of the copyright scheme; (2) the nature of home VCR usage as it relates to TV broadcasting, which in essence is merely a futherance of the objective of the broadcast; (3) the nature of the commercial television media; (4) the manner in which the movie industry has chosen to

exploit this media; and (5) the fact that the movie industry is being compensated for home VCR usage, it is an abuse of the monopoly power of copyright owners to attempt to extract additional and automatic revenue at the expense of the consumers merely on the basis of home reproduction of TV programs.

B. Congressional Authority to Adopt the Exemption Bill.

1. The adoption of an exemption bill does not involve any taking of property from copyright holders without just compensation. The "fair use" doctrine, a longstanding and well accepted judicial doctrine now included in Section 107 of the Copyright Act, places limitations on the copyright monopoly and has never been challenged as unconstitutional.

2. Congress has the authority to enact the exemption under the Fifth Amendment to the Constitution even if the use of home VCRs has an adverse impact on copyright holders.

3. The Supreme Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." Penn Central Transportation Company v. City of New York, 438 U.S. 104, 124 (1978).

4. Congress has the authority to determine the public purpose of a governmental action even when Congress's determination may substantially affect private economic interests and expectations. Berman v. Parker, 348 U.S. 26, 33 (1954).

5. Congress has broad discretion to regulate copyrights. See, e.g., Goldstein v. California, 412 U.S. 546, 562 (1973).

6. Plaintiffs in the litigation over use of VCR technology, Universal Pictures and Disney Studios, have "admitted that no actual harm to their copyrights has occurred to date." Thus, there is no evidence that adoption of the exemption would largely destroy the value of the copyrights, a standard imposed by the Supreme Court in deciding whether compensation is required. See, e.g., Andrus v. Allard, 444 U.S. 51, 66 (1979). In fact, an exemption would have no impact at all on the existing mechanisms discussed above (see IV.A.2) by which copyright holders are compensated for off-the-air recording.

7. In addition, adoption of the exemption would not limit or impair the copyright holder's control over his exclusive work in such areas as: exclusive broadcast rights; exclusive reproduction and sale rights for public showings; exclusive reproduction and sale rights for audiovisual tapes, cassettes, discs, and pay television. As the Supreme Court has stated: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, supra, 444 U.S. at 65-66.

8. Under the Constitution, therefore, Congress can enact an exemption for home recording of television programs for private viewing, because it will serve the public purpose of expanding access to

the public airwaves and greater dissemination of information.

C. The Current Copyright Act.

1. Interpretation of current law as it applies to off-the-air home taping of TV programs is being contested in Court.

2. The District Court, based on extensive findings of fact, determined that off-the-air home taping of TV programs does not constitute copyright infringement.

3. The Ninth Circuit Court of Appeals, while not purporting to assert that even one of the findings of fact by the District Court was "clearly erroneous," simply ignored all these findings and substituted therefor contrary generalized statements based on assumptions, and reversed the District Court decision.

4. The legislative history of the Copyright Act shows that Congress did not intend to extend the copyright monopoly over off-the-air home taping, of either audio or audiovisual material. The underlying rationale is shared by the copyright laws of over 30 countries which provide for exemptions for single copies of copyrighted works made for personal use. Those exemptions effectively encompass audio and video home taping.

5. Considering that home taping is only a necessary and transitory step between television broadcasts and home viewing for which TV program owners have been paid, such taping should be recognizable immediately as "fair use."

6. In the Betamax case, Universal and Disney not only failed to offer any evidence of damage caused by home taping; they "admitted that no actual harm to their copyrights had occurred to date." They also failed to offer any evidence that home taping would have any detrimental effect upon the potential market for, or value of, any of the motion pictures in issue.

7. Many copyright owners do not object to home taping of their programs for private viewing and there are many programs which are either uncopyrighted, uncopyrightable, or in the public domain. For example, approximately 20,000 motion pictures are not copyrighted (Appendix 9).

8. To the extent that ambiguity of the current statute permits copyright owners to reach into homes to prevent people from doing what was originally intended, that is, viewing of programs lawfully received, legislative measures to clarify that home taping of television programs for private viewing constitutes "fair use" are warranted.

VI. Statutory Royalty Scheme:

Imposition of a royalty scheme such as proposed by the "Mathias Amendment" would impose unnecessary restraints on the free functioning of the competitive marketplace and impose a discriminatory tax upon users of VCR technology for taping uncopyrighted materials. (For detailed comments on the "Mathias Amendment," see "The Case For Home Recording Rights," pp. 20-34; appendix 10.) Such a scheme and the attendant social costs are unwarranted because the market already is compensating copyright owners for home videotaping and will continue to pay such compensation even if a royalty scheme is adopted. Accordingly, such a scheme will amount to double payment to copyright holders.

A. Double Payment.

Copyright owners are not entitled to be compensated twice simply because some viewers choose to watch programs at a more convenient time. In similar circumstances, the Congress refused to impose a compulsory license fee on cable carriage of local broadcast signals because it concluded that program producers were fully compensated for such carriage by advertising revenues (see "The Case for Home Recording Rights" at pp. 44-46, Appendix 11).

B. Private Excise Tax.

A statutory royalty scheme is, in effect, nothing more than a private excise tax creating a windfall for the benefit of the motion picture industry in addition to the other benefits they already reap from home VCRs. The motion picture industry wants all of the economic benefits of home VCR use without giving the public the benefits of the new technology for private recording of programs broadcast over the free public airwaves. The royalty would, therefore, constitute an additional payment to copyright holders who are already receiving enormous revenues from the new methods of distributing their work made possible by VCR technology.

C. Impediment to Free Flow of Information.

A statutory royalty scheme can operate to impede the free flow of information by increasing the cost of distribution technology. _Cf_. Patterson, _Private Copyright and Public Communication: Free Speech Endangered_, 28 Van. L. Rev. 1161, 1206-1207 (1975). Taxes imposed on the dissemination of information have been disfavored by the Supreme Court, Grosjean v. American Press Co., 297 U.S. 233 (1936), and the royalty scheme would be akin to a tax on the means for receiving information that presumably would be similarly disfavored.

D. Undesirable Precedent.

Such a scheme will set an undesirable precedent of obligating a technological advance beneficial to everyone involved to subsidize a group of private enterprises affected by it.

1. The tax would impede the development of VCR technology in favor of competing technologies in which some copyright holders have an economic stake.
2. The tax would stifle the creativity stimulated by new VCR technology in developing new markets for copyright holders' work such as the prerecorded video cassette market, a growing outlet for motion picture distribution, which could not be enjoyed without home VCR technology.
3. It has been frequently argued that home VCR growth has been dependent on uncompensated use of the motion picture industry's programming; and indeed it has even been asserted that such programming has been "pirated" and "plundered" directly by VCR owners who record programs in their homes or even indirectly by manufacturers who market VCR devices. Yet, economic evidence indicates overwhelmingly that copyright holders can be and are in fact compensated for such recording.

4. The hardware could not exist without software. But the reverse is also true since, for instance, the motion picture camera and projector made possible a new industry. The existence of VCRs has created new markets for software that would not exist at all or exist as quickly without VCRs. Significantly, it is the ability of the public to record and make their existing television service more useful and convenient that is spurring the spread of home video technologies. (Playback capability alone through a videodisc has not yet captured a real market foothold.)

5. The attempt by the motion picture industry to set this unwarranted precedent has already resulted in the audio recording industry taking advantage of this occasion to seek a similar royalty on audio home recording, despite the fact that the legality of this practice has never been questioned.

E. Creation of Unnecessary Regulatory Bureaucracy.

Such a scheme will merely create another regulatory bureaucracy and social cost to the detriment of the consumer, unnecessarily distorting competition in the market place, which is the mechanism through which the value of copyrighted material can best be determined. Even Jack Valenti, President of the Motion Picture Association of America, recognizes that the best way to determine the value of copyrighted properties is through direct negotiations between copyright holders and exhibitors. To quote Mr. Valenti: "The sad truth is that the Copyright Royalty Tribunal can never take the place of marketplace action. No government tribunal, no matter how intelligently constituted can regulate supply and demand, nor fairly determine how much someone should pay for a television program. Who can make such a subjective decision except those who sell and those who buy in the marketplace?" (Statement of Jack Valenti, President of the Motion Picture Association of America, before the Senate Subcommittee of Communications of the Committee on Commerce, Science and Transportation, June 6, 1979.)

F. Inequity and Discrimination.

Such a scheme would create unjustifiable inequity and discrimination, because a uniform royalty on all home VCRs or all blank tapes cannot reflect the varying degrees to which each owner tapes copyrighted and uncopyrighted material. It, therefore, could violate the constitutional rights to public information of tapers of uncopyrighted material because no public purpose would be served by the tax.

1. There is a wide variety and massive amount of programming broadcast by television stations which is available for home recording by home VCR owners with the consent of the program owners. Also, most local-originated TV programming is recorded on tape prior to, or concurrently with, the broadcast -- but the tape thereafter is erased and reused without ever being registered for copyright; no protection exists against copying of such programs.

2. There are substantial uses of VCR technology that do not involve copyrighted materials, including making home movies, playing prerecorded video cassettes, and producing video materials for industrial purposes.

3. The tax would bear no relationship to the kinds of materials taped or to the compensation of copyright holders. It would, therefore, constitute a discriminatory penalty on users of home VCR technology who do not tape copyrighted materials.

G. Burden on the Consumer.

Whether a royalty is collected at the manufacturer level or at any other level, it is obvious that such an additional cost will be passed on to the consumer, either by increasing retail price or by preventing reduction of the price that would be made absent this extra cost.

H. Impracticality of the Scheme.

The three existing statutory royalty schemes in foreign countries are having serious difficulties. In the "Green Paper" the British Government has recognized the impracticality of such a scheme. The Copyright Royalty Tribunal has a dismal record, even in handling situations far simpler than home recording such as jukebox or cable licensing schemes. The former chairman has in fact called for its abolition.

VII. CONCLUSION:

The widespread use of home VCRs expands the availability of the free public airwaves without damaging the economic interests of copyright holders. In fact VCR technology has offered copyright holders, broadcasters, and producers a new, very lucrative market for their materials through sales and rentals of prerecorded video cassettes. Copyright holders can be and are compensated for taping of television programming by the market; and the imposition of a compulsory royalty or licensing scheme on functioning market mechanisms would result in a second payment to copyright holders. The costs of the royalties would be paid by consumers in addition to payments by the market to copyright holders today. Under the Constitution and the Copyright Act the rights of broadcast consumers to the free flow of information should not be overridden by the monopoly of copyright holders, especially if such a result accompanies an economic windfall for copyright holders. There is no justification for the regulatory bureaucracy and the social cost created by a statutory royalty scheme.

APPENDIX 1

The Media Statistics, Inc. survey taken in the Spring of 1980 states that, among households with VCRs, watching television programs as they are aired is the predominant viewing mode, accounting for about 30 hours, or almost 90 percent of the average 34.4 hours per week that viewing takes place.

The Media Statistics, Inc. survey taken in the Fall of 1981 shows that an average home VCR household watched TV real time 61 half-hours per week and watched home recording of TV programs 6.6 half-hours over the same period.

APPENDIX 2

In 1978 the Arbitron Company asked a group of VCR owners what they planned to do with each of the three programs they had most recently recorded: 66.2 percent said erase the program while only 18.1 percent said keep the program (and another 15.7 percent gave no answer). A 1978 "Survey of Betamax Owners", prepared by Crossley Surveys, Inc., asked respondents whether the last program they taped was recorded over a previous recording they had made: 87.6 percent said it was and in 66.4 percent of those cases they said the program had been watched only once before it was erased. A survey by Field Research Corporation, also in 1978, found that 75.4 percent of videorecorder owners used their machines for time-shifting half or more of the time and 38.8 percent said they used their videorecorders "almost always to shift viewing time."

More recently, in 1981 MART Magazine asked 2,000 owners of videorecorders, "What is your primary use of the VCR?" Only 10.2 percent said building a library of recorded programs, while 56.7 percent said recording while away from home or asleep or while watching another program, and 20.3 percent said playing prerecorded tapes. Taken together, this evidence all points to the conclusion that the great majority of videorecorder owners use their machines most of the time to record programs, watch them, and then to erase those programs and rerecord new ones.

APPENDIX 3

SURVEY RESULTS:

MODE OF RECORDING

	Media Statistics 1981[a]	Media Statistics 1980[a]	Nielsen 1979[b]	CPB 1979[a]	Crossley 1978[b]
By Timer/ Unattended	54%	53%	48%	50%	60.6%
While Watching Another Program	23%	27%	25%	25%	21.8%
While Watching Program Being Recorded	23%	20%	25%	25%	17.6%
Don't Know/ No Response	-	-	2%	-	-

Notes:

a Diary data: proportion of programs made in that mode.

b Proportion of respondents reporting that as mode in which last recording made.

APPENDIX 4

SURVEY RESULTS:

VIDEOTAPE OWNERSHIP

	Number of Tapes Owned That Were Not Prerecorded	
Survey	Median	Average
Media Statistics, 1981	14	24.11
Media Statistics, 1980	-a	16.1
Nielsen, 1979	3-6	-a
Crossley, 1978	20-24	28.72
Field, 1978	18	31.57

Notes:

a Not reported and cannot be calculated from reported results.

APPENDIX 5

1. Crossley Surveys - "A Survey of Betamax Owners" October, 1978

Q.5. Amount of Regular Television Watched Since Betamax Acquired.

About same amount - 56.5%
More - 25.4%
Less - 18.1%
Not Stated - 0.1%

2. Kalba Bowen Associates - "The Expanding Home Video Program Market - A Consumer Survey and Market Assessment." December, 1978

34. Do you think you watch more, the same or less television since you bought the recorder?

(44) 1. more
(41) 2. same
(15) 3. less
(-) 4. don't know

3. Time - "VCR vs. Discs? or Coexistence?" January to February, 1980

Relative Amount of Network Programming Viewed Since Acquiring Video Hardware:

	Own VCR	Own Disc	Own Both
More	20%	2%	9%
The same	59%	67%	41%
Less	18%	27%	45%

APPENDIX 6

MEASUREMENT OF VIDEOAPE AUDIENCES BY RATING SERVICES

The Arbitron Company and the A.C. Nielsen Company are the two major competitive audience measurement services. Both collect data using two quite different techniques: viewing diaries and meters attached to television sets. Although these two techniques collect different information on videotaping, in both cases measures of videotape viewing are included in the total reported audience and have been for some time.

Arbitron and Nielsen measure audiences in individual markets using both viewing diaries and meters. Diaries are sent periodically to samples of viewers in each of over two hundred individual markets. Meters are used to sample viewing in a few specific markets. In addition to its market samples, Nielsen uses both meters and diaries with national samples of viewers.

The meters used to collect viewing data are attached to television sets. The meter records when a set is turned on and the channel to which it is tuned. Meters provide information that is immediately available and that very reliably measures the use of the television set itself. On the other hand, since by their nature meters cannot record who is watching, they provide no information on whether the set is being watched while it is on, or on the demographic composition of viewing audiences.

Meters monitor videorecorders in much the same way they monitor television sets. If the household has a videorecorder, the meter also records when that videorecorder is taping off-air and the channel being taped. The number of households taping a program is then added to the number of households whose set was tuned to the program to establish the audience rating for the program. If a television set is tuned to one channel and a videorecorder in the same household is taping a different channel at the same time, each of the two programs is credited with a household viewing.

In other words meters treat broadcast and tape viewing analogously. In neither case is there any attempt to determine who in the household watches a program. Nor is there any direct attempt to measure whether anyone watches the television set that is turned on or the tape that is recorded. It is assumed, reasonably in both cases, that someone in the household watches. The tape audience and the broadcast audience then are added together to form the total reported audience.

Both services use viewing diaries to collect information on the composition of viewing audiences. Household members are asked to enter in diaries when each television set in the household is on or off, what is being watched while a set is being used, and who in the household is watching. Households in the market samples fill out diaries for one week. Nielsen's national diary sample is a continuing sample. The advantage of diaries is their more complete audience information. Their disadvantages are that their information is only as accurate as the entries by the responding households, and the information takes longer to process before it is available. In addition, diary information on individual markets is only collected during so-called sweep weeks, rather than continuously as is meter information.

Both rating services now follow similar procedures to measure videotape viewing with diaries. If diary keepers report that during the diary week they watched a tape of a program recorded during the diary week, the audience is moved to the day and time of the program's broadcast and added to the program's broadcast audience. Sometimes diary keepers report taping a program during the diary week but do not report any playback of the program, either because no entry was made when the tape was watched or because the household did not watch the tape before the end of the diary week. In such a case Arbitron and Nielsen still add a viewing by that household to the total audience reported for the program.

If no audience is reported for the viewing of a taped program, the ratings services still must specify who in the household watched the tape, because the market reports based on the data from diaries give the age and sex demographics of the audiences for individual programs. If the age and sex demographics of audiences within households depended on whether viewings were from broadcasts or from videotapes, the ratings services services would need diary entries for tape viewing to know the characteristics of the tape audience. After studying the viewing patterns of households with videorecorders, however, the rating services have concluded that the age and sex characteristics of household audiences do not depend on whether the viewing is from a tape or directly off-air. Consequently, they believe that they can accurately infer the age and sex demographics of unreported tape audiences of programs from the information they have on the age and sex demographics of the broadcast audiences of those same programs.

The first step of this procedure is to determine how many members of the taping household there are in each of the age and sex categories distinguished by the rating service. Next, the probability that a person in each of these age/sex categories would be in the tape audience is calculated from the diary data on the broadcast audience for that same program. These probabilities are then used to specify which members of the household comprised the tape audience for that program, given the assumption that someone watched the tape. His audience is credited to the program at the time of its broadcast and counted as part of the total reported audience.

Thus it is clear that both rating services are now counting viewers who make home recordings of broadcasts as part of total program audiences. The techniques for measuring home taping with meters appear to be well developed and quite accurate. The techniques for measuring home taping with diaries are not so advanced and complete, but the services already have designed improved procedures to be used when enough households have videorecorders to make such procedures cost effective.

The limitation of the diary procedures now used stem from the diary instrument itself and the instructions given households on how to use it. The diary and its instructions are not designed for households with videorecorders. The written instructions tell households to give complete information on how they use their television sets, but they do not say specifically that households should report video taping and tape viewing. (Households with videorecorders in Nielsen's national diary sample are given special verbal instructions.) The diary entries on home taping and viewing with videorecorders are those that households provide in response to general rather than specific instructions. Those responses probably are not as complete as they would be if households had a diary designed for entering use of videorecorders.

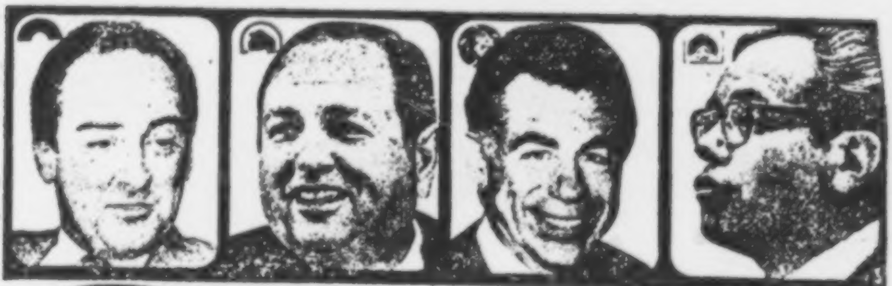
At least one of the ratings services has designed and field tested such a diary intended for use with videorecorders. The diary would be sent to households identified as owning a videorecorder and would collect information on video taping and tape viewing that should be as complete and accurate as current diary information on broadcast viewing. The rating service has decided not to use the videorecorder diary just yet for three reasons. First, given the recent court decision that home recording of copyrighted material infringes copyright, they are reluctant to use a diary that directly requests information on such taping. Second, the low penetration of videorecorders makes it difficult to identify accurately which households do and do not use this equipment. Third, the low penetration of videorecorders means that improved accuracy in measuring tape viewing would not contribute much to the overall accuracy with which they measure total audience.

Thus the ratings services measure home videotape recording and viewing as accurately as they believe current conditions warrant. They stand ready to measure both more accurately as tape viewers become a larger part of total program audience.

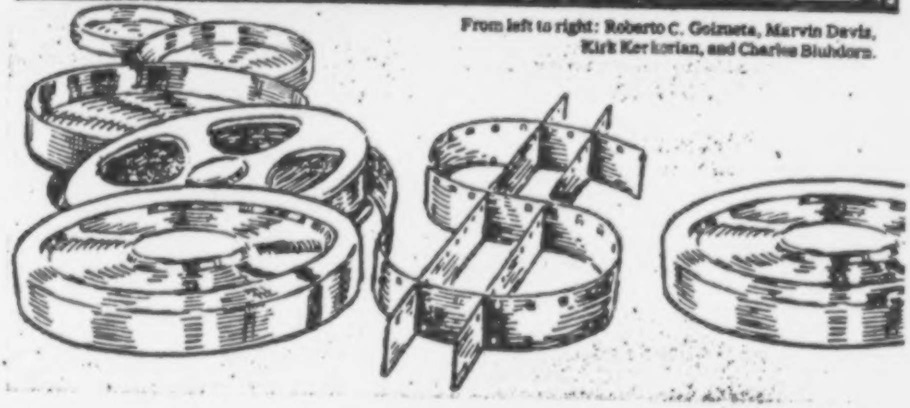
APPENDIX 7

THE NEW YORK TIMES, WEDNESDAY, JANUARY 20, 1982

Hollywood's Hidden Millions



From left to right: Roberto C. Goizueta, Marvin Davis, Kirk Kerkorian, and Charles Bluhdorn.



Accounting Rule Masking Future Profits

By THOMAS C. HAYES

Special to The New York Times

LOS ANGELES, Jan. 19 — A little-understood accounting rule, once mostly an annoyance, is today masking millions of dollars in future profits at prospering motion picture companies.

And it is these earnings, mostly the result of lucrative contracts with commercial and pay television, that have been part of the lure of Hollywood for Marvin Davis, the Denver oilman, and now the Coca-Cola Company and its chairman, Roberto C. Goizueta.

"We have more than $155 million of these contracts, which is largely profit, yet it is nowhere in our balance sheet or our income statements," said Francis T. Vincent Jr., president and chief executive of Columbia Pictures Inc., which has agreed in principle to be acquired by Coca-Cola for about $750 million.

What prevents Mr. Vincent and other movie executives from using such earnings to bolster their current bottom line is an accounting rule first adopted in 1973 by the Accounting Practices Board. The rule requires studios to record revenues from the sale of movies to nontheater outlets only when those films can be shown, which is typically a year or more after contracts are signed, because that is when the money actually changes hands.

Columbia Pictures stock surged after the Coca-Cola takeover was announced; the studio is noted for combining sound business practices and creativity. Page D4. Coke's move was seen by many analysts as a mistake. Market Place. Page D8.

When first put into effect, the rule was intended to bring some comparability to the financial statements of motion picture studios, which had been logging the relatively small revenues generated by such contracts at different times. But with the rapid growth of the home entertainment industry, the amount of future profits from licensing contracts with commercial, and especially pay, television rose sharply.

There is no delay in recording revenues for films being shown in theaters. Contracts typically call for rental receipts from films to be delivered immediately to the film companies. That money is matched against production costs, other expenses and taxes in the same reporting period. What remains is profit.

A banker familiar with the movie business estimated that as much as 20 percent of a typical movie company's assets are off the balance sheet as a result of the accounting rule, and the figure is growing.

Columbia, for example, last year signed one of the largest pay-television licensing agreements, for $8 million, for "Stir Crazy." It will also get a minimum of $8.5 million for the network-television rights to the film.

Gulf and Western Industries reported in its 1981 annual report that its subsidiary Paramount Pictures had "more than $400 million" in "unrecognized revenues" from agreements to show television programs and motion pictures. That was a 21 percent rise over the 1980 total of $330 million.

Assets Conservatively Stated

Because the accounting rule prohibits the studios from counting these contracts as current earnings, bankers and accountants close to the movie business contend that assets and projected cash flow are very conservatively stated by motion picture companies., As a result, lenders, investors and some industry analysts unaware of the subtleties often get too negative a picture.

But not sharp-eyed financiers. "They understand what is going on behind the numbers," Mr. Vincent said.

Indeed, Herbert Allen, president of the investment concern of Allen & Company and a major Columbia shareholder, has counterparts in Kirk Kerkorian, at the Metro-Goldwyn-Mayer Film Company; Mr. Davis, at the 20th Century-Fox Film Company, and Charles Bluhdorn, who as chairman of Gulf and Western Industries runs a varied investment portfolio that includes Paramount Pictures. Last month, Saul P. Steinberg, who controls the Reliance Group, made a bid for Filmways Inc., which was subsequently withdrawn.

To be sure, film libraries and distribution networks are important factors, as in the case at Filmways, a small company not ranked among Hollywood's major studios. So, obviously, are executives who can spot talent and package winning films and television programs.

The growth of new markets, including video cassettes and videodisks, has stirred interest in potential profits from film libraries. But most of the profit derived from such libraries comes from movies less than four years old, according to Alan Kassan, an entertainment analyst with First Manhattan, a brokerage firm.

Thus, many executives and analysts agree that success with new movies is the best gauge of future profits. Unlike many industries, however, the movie industry does not have perennially solid performers. In the last few years, Columbia, with films like "The Blue Lagoon," "Stir Crazy" and "Stripes," and Paramount, with "Ordinary People" and "Raiders of the Lost Ark," has been hot.

"Each time you produce a film, you have the possibility of an enormously profitable venture and the risk of colossal failure," said one banker with many customers in the motion picture business. "It's just like wildcat oil drilling."

This has made efforts to calculate the financial health of movie companies a fragile undertaking. In one sense, the delayed method of recognizing increasingly important income from pay television, network syndication, and most other new markets for movies and commercial television programs has muddied the art even further. (Revenues from videodisk licensing, also rising fast, are recorded at the time a contract is signed.)

On the other hand, the millions in future revenues being locked in by newly drawn contracts in the so-called ancillary markets have served to stabilize a company's prospects for at least three or four years.

"What it does is build your confidence in these companies' ability to persist as companies," said Theodore E. James Jr., an entertainment analyst with Montgomery Securities Inc. Mr. Kassan added, "Columbia has the best product in the last three years, and the best position."

Columbia, for example, licensed its 1979 hit, "Kramer vs. Kramer," to ABC last year for more than $15 million. ABC is permitted to schedule the movie twice in the 24 months beginning in September 1982.

Even though Columbia has a firm contract, it cannot realize the fees paid by ABC until next September, when "Kramer" will be available to be shown. That is the start of Columbia's 1983 fiscal year. On Jan. 7, Daily Variety reported that Columbia agreed to license "Only When I Laugh," "The Blue Lagoon" and "Seems Like Old Times" to NBC for $18 million. A Columbia spokesman declined comment.

Elsewhere, Columbia has sold the rights to "Stripes" to pay television for next summer, and the movie's network rights beginning in September 1983. Columbia also is syndicating rights to "Fantasy Island," now in its sixth year on network television, to local stations around the country. Dozens of contracts have been written, but Columbia cannot record the revenues until the fall of 1983, when the stations will be able to show the series.

Moreover, the network television rights for Columbia's movie version of "Annie," the long-running Broadway musical, were sold to NBC for about $10 million. The deal was completed long before the movie went into production. Again, the accounting method blocks Columbia from adding the revenue on its books until NBC shows the movie.

In the main, motion pictures do not become profitable from box-office revenues alone, according to analysts. In fact, a company's outlook "can be really distorted" by big box-office numbers if investors and creditors do not look into production costs, profit participation rights and distribution agreements, Mr. James said.

On average, film companies break even on box-office revenues, according to Mr. Kassan of First Manhattan. He compiled figures showing that the eight major film companies, on average, took in $270 million in revenues last year. That is matched against $130 million in production costs for a total of 13 films, about $100 million in total marketing costs and $40 million in distribution.

The profit margins are built beyond the box office, Mr. Kassan said, from approximately $125 million in additional revenues. Studios generated about $40 million by licensing films to pay television last year (with the figure likely to approach $80 million this year). Network television licensing is worth another $30 million. Video cassette deals, at about $30 million last year, are expected to outpace network deals for the first time this year. Foreign and local television syndication is in the range of $25 million.

The costs of taking in the extra revenue are small, covering mostly sales, administration and film library maintenance. The rest drops to the bottom line as retained earnings.

"There will be very high profits on these films as they are licensed in the various ancillary markets," Mr. Kassan said. He added, however, that the logic works "only if you have good pictures."

APPENDIX 8

1. Film Superlist: 20,000 Motion Pictures in the U.S. Public Domain, Minus and Hale
7 Arts Press Inc., Hollywood

2. Among the programming broadcast by TV stations available for home recording by VCR owners with the consent of the program owners: entertainment programming (the Spider Man series), children's programming (Mr. Rogers' Neighborhood, the most widely viewed children's program in the nation, with three million families viewing daily), sports programming (Major League Baseball, National Football League, National Basketball Association, National Hockey League, National Collegiate Athletic Association), religious programming (National Religious Broadcasters, Faith Center), educational programming (the Bureau of Mass Communications of the New York State Education Department, the Center for Library Media and Telecommunications of the Board of Education of the City of New York, the New Jersey Public Broadcasting Authority, the Los Angeles City School Board of Education). Such available programming also includes motion pictures which are not copyrightable to start with (e.g., 17 U.S.C. § 105) or on which copyright has expired (e.g., My Man Godfrey).

APPENDIX 9

B. Royalty Fee Legislation -- Amendment No. 1242

On December 16, 1981, Senator Charles McC. Mathias (R-MD) introduced an "amendment in the nature of a substitute" for S. 1758. As the phrase in quotes indicates, this proposal is not an addition to S. 1758 but rather would replace the operative terms of the original bill with an entirely different approach. In other words, Senator Mathias' proposal could have been introduced as a freestanding bill without need for any changes or additions. As its relative length -- 13 pages versus less than 2 pages for the exemption bill -- suggests, this "amendment" is more complicated than the vehicle to which it is attached.

1. Video Taping Is Copyright Infringement

The Mathias amendment declares that all reproduction of copyrighted audiovisual works through video taping is copyright infringement. Individuals who tape for non-commercial purposes, however, would not be liable for the infringement. Instead, the liability would be placed on the importer or manufacturer or video recording devices or media (such as tape) for the infringing activity of individuals who reproduce copyrighted works using the video recording devices and media.

2. Compulsory License

Each video product (i.e., recording device or recording medium) manufacturer and importer would be required to obtain a compulsory license. A compulsory license generally enables a person to use a copyrighted work by complying with certain conditions, notwithstanding the fact that the use would otherwise be infringement. Under the Mathias amendment, a video product manufacturer or importer could obtain a compulsory license by registering and by filing account statements with the Register of

Copyrights. Registration would require a filing of a "Notice" with the Register within sixty days of the Act's effective date. The account statements would be filed periodically and would indicate the quantity and type of video product manufactured or distributed during the relevant time period.

This compulsory license would be required for each manufacturer or importer of a "video recording device" or of a "video recording medium." Under the amendment, a "video recording device" is defined as "any machine or device of a kind used or promoted for the primary purpose of making video recordings by individuals in private homes." This definition appears to encompass every VCR on the market, even if primarily used to record non-copyrighted material or material for which the copyright holder has consented to private recording.

Similarly, a "video recording medium" is defined as "any material object . . . in which a motion picture or other audiovisual work can be fixed by use of a video recording device." This definition includes blank video tapes but is broad enough to include prerecorded tapes as well. Such tapes are produced using commercial equipment which is more sophisticated than the home VCRs covered by the amendments definition of video recording device. Home VCRs are also capable, however, of producing such tapes, and thus prerecorded tapes would fall under the definition of video recording medium. Further, new material can be recorded over the prerecorded material using a home-style VCR, again bringing the prerecorded tapes within the definition of video recording medium. The significance of this, apart from the potential for confusion, is that purchasers of prerecorded tapes could be charged a double royalty -- once for the material which is already on the tape and once because the tape is subject to the fee on a "video recording medium." At the very least, this adds another thorny issue to the CRT's burden under the amendment.

3. Royalty Fees

The Mathias amendment requires manufacturers and distributors of the defined video products to pay a royalty fee to be determined by the Copyright Royalty Tribunal ("Tribunal"). The Tribunal, created by Congress in 1976 as an independent agency in the Legislative branch, is composed of five Commissioners and charged with making determinations concerning the copyright royalty rates for records, jukeboxes, and certain cable transmissions. It also distributes the royalty fees and, in case of controversy among claimants, determines their distribution.[2]

The Mathias amendment requires that the Tribunal hold a formal proceeding to establish "appropriate and reasonable" royalty fees so that copyright owners receive "fair compensation." The amendment also allows the Tribunal to set rules by which royalties either would not be paid at all on tapes used principally for purposes other than making home video recordings of copyrighted material or would be reduced for all tapes and devices to account for the fact that not all VCR uses infringe on copyrights. Presumably, before setting rules on this issue, the Tribunal would weigh evidence on the proportion of tapes used for these various purposes.

A draft of Mathias' statement on his amendment had suggested that royalty fees might be appropriate on tapes but not the VCRs themselves. His final statement when the amendment was introduced did not, however, include such a provision. The only indication that the Tribunal should consider the fact that VCRs are used for noninfringing purposes is in the adjustment to the royalty fee noted above. On that point, Mathias' introductory remarks included the following:

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[2] See Part IV for a more detailed discussion of the Royalty Tribunal.

> "[T]he Copyright Royalty Tribunal will have authority to consider all relevant factors in settling the royalty. One of these factors is the number of tapes not used for recording copyrighted works. For instance, should the Tribunal find that some percentage of the blank tapes sold in this country are never used to record copyrighted material, it could adjust the royalty fee accordingly. Similarly, the Tribunal will be able to take into account the nature of video recording practices. such as timeshifting."

Unfortunately, the legislation itself contains no guidance to the Tribunal on how to determine the extent of non-infringing usage or how to use such information to adjust royalty fees. Also, there is no guidance as to how to treat "time-shifting" use which Mathias' introductory remarks seem to suggest is less bad than some other video taping activities.

Once a fee determination is made, a manufacturer or importer must pay the Register of Copyrights when submitting the account statements. The amendment does not provide, as did an earlier draft, that the Tribunal may waive payment of a royalty fee if it is insufficient to cover the cost of collection.

4. Copyright Royalty Tribunal's Proceedings

The Mathias amendment requires that within thirty days of the Act's effective date the Chairman of the Tribunal publicly announce the commencement of proceedings to determine "appropriate and reasonable" royalty fees. Within one year of such notice the Tribunal would be required to render its final decision. That decision would be effective within thirty days following its publication. The amendment specifically precludes a stay of the effective date of the decision pending a court appeal. Thus, within fourteen months of the date of enactment of the legislation, manufacturers and distributors would be required to start paying royalty fees. The Tribunal is supposed to consider evidence and studies on VCR usage and other matters. Considering the numerous complex issues and the Tribunal's demonstrated inefficiency, Tribunal compliance with this rigorous schedule is unrealistic, and requiring payments before appeals are decided is unfair.

Under this amendment, this lengthy process would be repeated in 1985 and every five years thereafter.

5. Claims for Royalty Payments

The Mathias amendment provides that the royalties are to be distributed to copyright owners who file claims individually or in groups. If the Tribunal finds that a controversy exists between claimants concerning distribution of the royalties (a likely possibility), then the Tribunal will hold a formal proceeding. Neither the Mathias amendment nor the statement provides any clue as to what criteria the Tribunal should use in distributing the revenues.

6. Non-Compliance

The Mathias amendment provides that manufacturers or importers who distribute video products regulated under the legislation without a compulsory license are subject to all sanctions available under the Act. Such sanctions include injunctions, impoundment and destruction, actual damages, statutory damages, and criminal penalties. The amendment also permits a court to deprive an importer or manufacturer of the benefits of a compulsory license for a period not to exceed ninety days.

7. "First Sale" Doctrine Modified for Sound Recordings and Video Tapes

The "first sale doctrine" is a principle of copyright law whereby a copyright owner's right to control his product ceases with respect to a particular copy once he has parted with ownership of it. The purchaser is entitled to resell, lease, or even destroy the object. (He may not, however, copy it.) The "first sale doctrine" thus recognizes that the copyright owner's interest in controlling the distribution of a particular work is generally fulfilled upon consent to the first sale of the work.

The Mathias amendment would allow the copyright owner to prohibit or otherwise regulate the rental or loan of copies of its product if the person renting or lending it received any commercial benefit. Thus, a copyright owner could even forbid exchanges or swaps of prerecorded tapes between families.

This restriction of the first sale doctrine would probably increase charges to consumers for video cassette rentals. Video dealers can now purchase video cassettes from movie companies and lease them to as many customers as are interested. The Mathias amendment, however, would give the movie companies the power to prevent such rentals, or to limit them so drastically that dealers will either have to charge much higher rental prices or go out of the rental business entirely.

This provision is a significant departure from historic copyright law principles. Further, this is the only provision of the amendment which would apply beyond the video field, to sound recordings. While the proposal is intended to make certain that copyright owners of movies and records are able to participate in the commercial benefits of renting their products, the solution of eliminating this historic copyright doctrine seems too radical. This is especially true since such copyright holders can participate, and in several cases are already participating, in the apparently lucrative rental market simply by not selling the product in the first place. This leaves them free to rent their products themselves and to control rentals by others.

IV. THE ROLE OF THE COPYRIGHT ROYALTY TRIBUNAL

The major proposal for compensating copyright owners for home video recording of their works is the suggestion that Congress authorize the Copyright Royalty Tribunal ("CRT") to administer a system of copyright royalties for video recording. This legislation, proposed by Senator Mathias, would give the CRT

3/ The proposal, Amendment 1242 to S.1758, is described in part III.

substantial responsibility for evaluating, setting, and distributing compulsory royalties for video recording, with only minimal legislative guidance.[3] The CRT's dismal record in discharging its existing responsibilities, however, suggests that it would be absurd to burden with substantial and complex new duties a body whose own chairman has recommended be abolished.[4]

A. Duties of the Copyright Royalty Tribunal

The 1976 Copyright Act provides that specified uses of copyrighted works are subject to compulsory licenses, under which royalties must be paid for the privilege of using the works. Royalty fees are collected from users of copyrighted materials, including operators of cable television systems, jukebox owners, and public broadcasting stations, and distributed to individual copyright owners or their representatives, such as ASCAP and BMI.[5] The compulsory license provisions are intended to assure that copyright owners are paid for the use of their works in circumstances in which Congress has determined that marketplace negotiations would not succeed, either because they would be too complicated or because the copyright owner would have the bargaining power of a monopolist.

The Copyright Royalty Tribunal is an independent agency established in 1976 to issue rules concerning the rates for these royalties and the distribution of payments to copyright owners from the central fund under the compulsory license provisions of

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4/ *Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 51 (March 4, 1981) (testimony of Clarence James, Chairman, Copyright Royalty Tribunal) ("James").

5/ Specifically, compulsory licenses apply to certain cable retransmissions, 17 U.S.C. §111, jukebox performances, §116, phonorecords, §115, and public broadcasting use of certain kinds of copyrighted works, §118.

the Copyright Act.[6] For example, the CRT determines the proper distribution of compulsory license royalties for cable retransmission of certain television broadcast signals and for jukebox performances of musical compositions.[7] Even where the Copyright Act specifies the compulsory license fees, as in the case of jukebox performances, cable retransmissions, and record sales, the CRT must periodically review these rates and adjust them if warranted. Congress has also given the CRT responsibility for determining license fees for public broadcasting use of certain copyrighted works. CRT decisions establishing compulsory license fees or distribution of license fees are subject to judicial review by the courts of appeals.[8]

B. The CRT's Record

The CRT has been plagued since its creation by inadequacies and failures. A principal problem has been its apparent inability to establish workable criteria for determining royalties, for which Congress provided no clear-cut standards. The Copyright Act simply directs the CRT to balance such vague and subjective criteria as "the relative roles of the copyright owner and the copyright user in the product made available to the public"; "maximizing the availability of creative works to the public"; and the need to provide "a fair return" to copyright owners for their creations.[9] Wilbur D. Campbell, Deputy Director of the GAO, has accurately noted that "the current appeals of [four of the five] key Tribunal decisions attest to the vagueness of the legislated criteria since each of the appeals challenges the very basis of the Tribunal's decisions."[10]

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[6] 17 U.S.C. §800 et seq.

[7] Copyright owners receive their fees directly, without government involvement, for phonorecord sales and public broadcasting use. See generally Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Committee on the Judiciary, 97th Cong. 1st Sess. 85, 87-89 (statement of Wilbur D. Campbell, Deputy Director, Accounting and Financial Management Division, General Accounting Office) ("Campbell").

[8] 17 U.S.C. §810.

[9] 17 U.S.C. §801(b).

In the meantime, as the appeals process drags on, millions of dollars in copyright royalties remain undistributed. The problem caused by the CRT's failure to make timely distributions are enormous, according to former CRT Chairman James.[11] James said that payment to copyright owners ideally should be made within a year after the royalties are paid into the government fund, yet disputes which drag on for four to five years can be expected to become the rule rather than the exception.[12] Pending the disposition of appeals and eventual distribution to copyright owners, over $41.6 million in cable funds remain on deposit with the Treasury Department from 1978, 1979 and 1980 cable royalty payments. According to Chairman James' estimates, the appeal on the 1978 funds "may be" concluded in 1983, barring a remand of the proceedings to the CRT and any subsequent appeals. Similarly, nearly $2.2 million in 1979 and 1980 jukebox royalty funds remained undistributed. A total undistributed royalty fund of over $100 million is not an unreasonable estimate for the near future, in James's view, "because of the existing appeals, and the possibility of future appeals on each and every distribution proceeding held by the Tribunal."[13]

Even if Congress had set out clearer standards for CRT decisions, the agency would not be able to handle complex rate review and distribution matters. Several basic organizational flaws impede the CRT's ability to reach prompt, supportable decisions.[14] For example, although the CRT's decisions have a direct financial effect on groups affected by compulsory licenses, the CRT receives only such evidence as the parties before it choose to submit because it lacks subpoena power. In addition, the Tribunal has no general counsel, although its duties require it to deal with complex legal issues involving contracts law, the First Amendment, and the Administrative Procedure Act, as well as copyright law. Indeed, only two of the five original commissioners were lawyers, and only one had any significant familiarity with copyright law before his appointment. Similarly, although economic analysis is critical in determining appropriate royalty rates and distribution, the CRT retains no economic consultants. Due in part to its lack of expertise and its inability to compel the production of relevant evidence, CRT proceedings have crept at a snail's pace.[15]

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[10] Campbell at 81.

[11] James at 56-57.

[12] *Id.*

[13] James at 57.

Under the current system, copyright owners "are effectively being denied their just rewards -- the proceeds from the royalty funds timely paid."[16] In fact, copyright holders are footing part of the bill for the CRT's inefficiencies. since the costs of the CRT's royalty distribution procedures -- a total of over a half-million dollars in 1978 -- are deducted from the royalty pool.[17]

The CRT has obviously failed to discharge its responsibilities for royalty determination and distribution under the existing compulsory license provisions. Giving the CRT new responsibilities for royalties for home video taping of copyrighted materials would only compound the present administrative nightmare. For example, there are no easy guidelines or CRT precedents to help it establish video royalty rates. In other proceedings the CRT has been able to look to broadcast logs, record sales, or jukebox revenues for some objective starting point for determining the use made of copyrighted works covered by compulsory licensing.[18] There is no similar basis in the VCR area for determining the extent of home video recording of copyrighted works.

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[14] Campbell at 94-102.

[15] Campbell at 79.

[16] Id.

[17] Id. at 78.

The CRT would also have to grapple with the difficult question of how to reflect the use of VCRs for "time-shifting" purposes in its rate determinations. These decisions could require the CRT to study VCR users' actual recording behavior, with the attendant expense and difficulty of conducting such studies and a danger of privacy intrusion from monitoring home viewing.

The obvious conclusion, given the complexity and character of the decisions that have to be made about compensation for video taping, is that the CRT is not the right place to make them. They are better left to the competitive marketplace of copyright owners and broadcasters which has the incentive, responsiveness, and sensitivity to set compensation levels that accurately reflect the value of video taping copyrighted material.

18/ James at 54.

APPENDIX 10

C. Compensation in the Cable Television System

Copyright owners are not entitled to additional compensation, beyond what they are already paid to allow their programs to be shown on television, simply because some viewers choose to watch those programs at a more convenient time with the aid of a VCR. Congress has reached an analogous conclusion in a similar situation involving retransmission of broadcast signals by cable television systems.

Cable systems are required by the Federal Communications Commission to retransmit the signals of all local television stations.[19] The 1976 Copyright Act grants them an immunity from copyright infringement for the transmission of these local "must carry" signals.[20] In addition, in order to retransmit signals from distant stations, the cable operator must obtain a "compulsory license" for which it pays royalty fees based on the system's gross receipts for its basic service.[21]

Significantly, however, Congress determined that copyright owners of programming retransmitted in the same local area would not be entitled to royalties fees because the cable retransmission caused them no harm. Copyright owners were explicitly found by Congress to have been fully compensated for the local audience through their negotiations with broadcasters:

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[19] 47 C.F.R. §§76.59(a), 76.61(a), as amended in Report and Order in Docket Nos. 20988 and 21284, 45 Fed. Reg. 60186 (1980) at Appendix E.

[20] 17 U.S.C. §111(d).

[21] 17 U.S.C. § 111(d)(2)(B).

> . . . there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.[22]

The basis for this conclusion is that local retransmission does not alter the size of the local audience for the broadcast but merely affects the way in which some viewers watch the program, for example, with improved reception from a stronger signal. The effect of VCR use on the audience for broadcasts of copyrighted programs is almost identical: viewers can watch the same program several hours later, for example, or broken into segments that suit their schedules. The critical factor in both cases is that copyright owners receive full compensation for the entire measurable audience, even if technology permits variations in the means of capturing and watching the signals.

22/ H.R. Rep. No. 94-1476, 9th Cong. 2d Sess. 90 (1976).

May 15, 1982

FAIR USE AND NEW TECHNOLOGY

I. Introduction

The United States Court of Appeals for the Ninth Circuit recently ruled that the videotape recording of televised broadcasts of copyrighted works by individuals in their homes is an infringement of the copyrights on those works. Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963 (9th Cir. 1981), petition for cert. filed, 50 U.S. L.W. 3768 (U.S. March 12, 1982) (No. 81-1687) (the "Betamax" case). Legislation pending in Congress would reverse the Ninth Circuit's decision by providing that an individual who makes a single video recording of an audiovisual work for private use has not infringed the copyright on that work. This legislation correctly recognizes that the primary use of videotape or videocassette recorders ("VTRs") is to gain access to television broadcasts which otherwise might not be viewed and thus constitutes fair use rather than infringement. Some of the pending legislation, in addition, would impose a system of compulsory licenses on videotape recording apparatus and tape.

Videotape recorders can record audiovisual material telecast over the public air waves so that the material may be viewed at another time. This "time-shifting," or the delay of viewing of television programs until a later time, is the primary use of VTRs. VTRs thus provide the public with new access to programs transmitted over the broadcast frequencies.

The doctrine of fair use, as codified in the Copyright Act of 1976, applies to this new video technology so that no infringement occurs when a consumer videotapes a copyrighted telecast for his own use or that of his family. Congress' treatment of similar technologies used solely for noncommercial purposes in the home supports this application of the doctrine of fair use to this new technology.

Moreover, the Copyright Act must be construed in such a way that it does not infringe the First Amendment right to free speech, which includes the right to listen and to receive information. The First Amendment thus mandates a reading of the Copyright Act which finds that noncommercial videotaping of copyrighted broadcasts for private use is fair use of the copyrighted material.

In addition to finding infringement where only fair use exists, the proposals for compulsory licensing also are misguided in that they would impose liability for contributory infringement by the manufacturers or importers of videotape recording devices and tape where the primary infringement is excused or does not exist.

II. The Doctrine Of Fair Use Is Flexible And Enables Copyright Law To Apply To New Technologies.

Section 106(1) of the Act gives the copyright owner the exclusive right "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. §106(1). Despite the wording, this right is not absolute, but is subject to the countervailing right of fair use. Fair use is not an infringement of copyright. 17 U.S.C. §107.

The doctrine of fair use was given its first statutory recognition in section 107 of the Act, which provides:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [§106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use on the potential market for or value of the copyrighted work.

17 U.S.C. §107.

According to the House Committee on the Judiciary, the four criteria enumerated in section 107 are not meant to be "definitive or determinative," but rather to "provide some gauge for balancing the equities." H. R. Rep. No. 1476, 94th Cong., 2d Sess. 65.

In addition to stating that section 107 was merely a codification of the judicial doctrine of fair use, Congress made it clear that the doctrine should continue to be flexible and applies on a case-by-case basis:

> The statement of the fair use doctrine in section 107 offers some guidance to users on determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

Id. at 66 (emphasis added). The Senate Judiciary Committee also emphasized that "there is no purpose of either freezing or changing the doctrine" of fair use. S. Rep. No. 743, 94th Cong., 1st Sess. at 62 (1975).

The doctrine of fair use was first judicially recognized in this country in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841), where the court stated:

> [W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profit, or supersede the objects, of the original work.

9 F. Cas. at 348. "Fair use" has been defined more recently as "a 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . .'" Rosemont Enterprises v. Random House, 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967), quoting Ball, Copyright and Literary Property 260 (1944).

The issue of fair use has been raised only recently in connection with the application of copyright law to new technologies. See Betamax, supra; Encyclopedia Britannica Educational Corp. v. Crooks, 447 F.Supp. 243 (W.D.N.Y. 1978) (videotape recording); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided court, 420 U.S. 376 (1975) (photocopying); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) (photocopying); see also Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980) (television broadcast of cover of "TV Guide" as part of advertisement for competing publication); Bruzzone v. Miller Brewing Co., 202 U.S.P.Q. 809

(N.D. Cal. 1979) (use of still photographs from television commercial in storyboards for purpose of market research).

Courts confronted with the application of copyright law to new technologies have not always considered the doctrine of fair use. Many of the cases involved only the question of whether the product of the new technology could be copyrighted or whether it could infringe a copyright. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photographs); Edison v. Lubin, 122 F. 240 (3d Cir. 1903), appeal dismissed, 195 U.S. 624 (1904) (motion pictures); American Mutoscope & Biograph Co. v. Edison Manufacturing Co., 137 F. 262 (D.N.J. 1905) (motion pictures encompassing more than one idea); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908) (mechanical player-piano rolls).

Other cases involving new technologies have raised the issue of whether a performance is public or private. See (under the 1909 Act) Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F.2d 411, 412 (6th Cir.), cert. denied, 269 U.S. 556 (1925) (radio broadcasts were public performances infringing copyrights); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (cable television transmission of licensed broadcasts of motion pictures did not infringe copyrights); Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974) (reception and retransmission of distant broadcast station signals by a cable television system did not constitute a "performance"); and (under the 1976 Act) WGN Continental Broadcasting v. United Video, Inc., 523 F.Supp. 403, 413 (N.D. Ill. 1981) (satellite transmission of broadcast of copyrighted works is a passive activity not infringing copyrights); contra, Eastern Microwave, Inc. v. Doubleday Sports, Inc., No. 81-CV-303 (N.D.N.Y. March 12, 1982).

Encyclopedia Britannica Educational Corp. v. Crooks, supra, is the only case other than Betamax to consider the question of fair use in connection with off-the-air videotape recording. In that case, the Board of Cooperative Education Services of Erie County, New York ("BOCES"), a nonprofit corporation, had videotaped a large number of copyrighted educational television broadcasts and distributed the tapes to over 100 schools for later performance in the classroom. While indicating that the defense of fair use would require a full trial on the merits, the court granted the plaintiff's motion for a preliminary injunction, stating that it thought "the substantiality of the copying and the possible impact on the market for education films tip the balance in favor of the plaintiffs, outweighing BOCES' noncommercial, educational purpose in copying the films." 447 F. Supp. at 252.

Although photocopying was not a new technology when the first cases involving the process reached the courts, the process recently had been improved so that photocopying was inexpensive and readily available, see Williams & Wilkins, supra, 487 F.2d at 1355. In Wihtol v. Crow, supra, a high school choir director made a machine-reproduced copy of his new arrangement of a copyrighted song without obtaining a license to do so from the copyright owner. In rejecting his defense of fair use, the court considered the fact that the choir director had used the entire song to be more significant than the technology he used to duplicate it. Nonetheless, use of an entire copyrighted work may be a fair use. See New York Tribune, Inc. v. Otis & Co., 39 F.Supp. 67 (S.D.N.Y. 1941) (newspaper editorial).

The Court of Claims reached the opposite result from Wihtol in Williams & Wilkins Co., supra, holding that the photoreproduction of entire articles in medical and scientific journals by the National Library of Medicine ("NLM") and the National Institutes of Health ("NIH") constituted "fair use" and not copyright infringement. The libraries each had one or two subscriptions to medical journals which they used to make photocopies of requested articles to satisfy the needs of NIH and NLM researchers. Although the libraries' policy was to supply only one copy of a journal article per request and to limit each request to 40 or 50 pages and no more than one article in any given journal, the libraries made as many as 93,000 photocopies of articles in one year.

The Court of Claims summarized what it considered the "core" of its decision:

> First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringement; and, third, since the problem of accommodating the interests of science with those of publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine.

487 F.2d 1354.

Nonetheless, the Court of Claims' decision that the photoduplication was fair use rested in large part upon the fact that the copies made by NLM and NIH were used for the personal needs of library researchers. The court was impressed by the fact that people asking the libraries for photocopies ordinarily were individual researchers who wanted the articles for their "personal use in their scientific work and [who had] no purpose to reduplicate them for sale or other general distribution . . . ." 487 F.2d at 1354. It is this use of the copyrighted materials which distinguishes Williams & Wilkins from Wihtol, where there was a public performance using multiple copies of the copyrighted song, and from Encyclopedia Britannica, where there was "a highly organized and systematic program for reproducing videotapes" and distributing them to schools, 447 F. Supp. at 252.

In contrast, the court in Williams & Wilkins noted that "[t]here is no showing whatever that the recipients use the libraries' photocopying process to sell the copies or distribute them broadly." Id. at 1354.

The Williams & Wilkins court stated, without citation, that

> [I]t is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use, and in the era before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files. These customary facts of copyright-life are among our givens.

Id. at 1350. The issue, according to the court, was whether this new method of copying for a scholar's own use is to be accorded the same treatment as a handmade or typewritten copy. Id.

One commentator has summarized the "givens" the Court of Claims recognized as: "Anyone may copy copyrighted materials for purposes of private study and review." Cohen, Fair Use in the Law of Copyright, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 58 (1955). Another has suggested that:

> The only reasonably sane solution is to recognize that private use is completely outside the scope and intent of restriction by copyright. If a later public use is made, that may be a violation of a copyright; but that would be independent of whether the violating use were made from the original, from a copy written out in the man's own hand, or from a photocopy provided by a library; the copying which would be a potential violation would be the public use; and the act of making a copy for private use is obviously (to this writer, at least) not a violation of anything at all.

Shaw, Publication and Distribution of Scientific Literature, 17 COLLEGE & RESEARCH LIBR. 293, 301 (1956).

The Supreme Court has implied that it shares this view:

> To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works. An author who possesses an unlimited copyright may preclude others from copying his creation for commercial purposes without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works.

Goldstein v. California, 412 U.S. 546, 555 (1973) (emphasis added).

III. Home Videotape Recording Is For "Access" Rather Than For "Use".

The home videotaping of television broadcasts is similar to the photoreproduction in Williams & Wilkins and unlike the copying in other fair use cases, in that the intention of the use of home videotape recorders is only to gain access to the copyrighted material. The people making copies of television broadcasts at home with their VTRs are not seeking to misappropriate the work of the copyright owners to any profit-motivated end. Their situation is similar to that in Williams & Wilkins, where the Court of

Claims stated "[t]here has been no attempt to misappropriate the work of earlier scientific writings to forbidden ends, but rather an effort to gain easier access to the material for study and research." 487 F.2d at 1354 (emphasis added).

Previous fair use cases have involved situations where all or portions of a copyrighted work were copied and then incorporated into another work which often competed with the original work. See e.g., Encyclopedia Britannica, supra, where thousands of unauthorized videotapes of copyrighted broadcasts were made and distributed to over 100 schools; Wihtol v. Crow, supra, where a choir director made a new arrangement of a copyrighted song and reproduced copies for the members of his choir; Rosemont Enterprises v. Random House, Inc., supra, where a biographer of Howard Hughes used material he had taken without authorization from an earlier biography; Loew's, Inc. v. Columbia Broadcasting System, 131 F.Supp. 165 (S.D. Cal. 1955), aff'd sub nom., Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), aff'd by an equally divided court, 356 U.S. 43 (1958), where comedian Jack Benny infringed the copyright of the movie "Gaslight" by satirizing it in a television skit.

These precedents have little relevance to the situation of noncommercial home videotaping. Individuals use their VTRs to obtain single copies of television broadcasts for purposes of time-shifting for convenience and not to incorporate the taped broadcast in other works. Of course, as the pending legislation provides, any attempt to profit from videotape recordings made in the home could certainly be treated as copyright infringement.

The three criteria specified in section 107 of the Act which contain the word "use" must be read with this thought in mind -- the use here is not "use" as the fair use doctrine traditionally has defined it. The use here is the "use" referred to in the observation of Professor Kaplan, cited by the Williams & Wilkins court, that "it is 'fundamental that "use" is not the same as "infringement" [and] that use short of infringement is to be encouraged . . . .'" 487 F.2d at 1362. The fourth criterion, that of the nature of the copyrighted work, does not refer to "use." Given the diverse nature of copyrighted television broadcasts, this factor cannot be evaluated in the abstract.

A. The Purpose and Character of the Use

In the case of home videotaping of copyrighted works, the first criterion -- the purpose and character of the use -- is to obtain access to the copyrighted work for a noncommercial private use, as opposed to incorporating it in another work which competes with the copyrighted work. This type of use is similar to that in Williams & Wilkins, supra, where fair use was deemed to include the photocopying of entire copyrighted works for purposes of access, rather than for the purpose of using them in some other work. The court enumerated common examples of such use for access: lawyers who make photocopies of recent decisions from copyrighted reports for practical use in connection with litigation, a judge who makes a photocopy of a law review article from a copyrighted law journal to give another judge so they can discuss its pertinence to a problem under their consideration, or a person who photocopies a copyrighted newspaper article to give a friend. 487 F.2d at 1353. The people using videotape recorders at home similarly are not incorporating copyrighted works into new works of their own; they are merely gaining the access intended by the broadcast of these works over the public airwaves. Such access might not occur at all without the use of VTRs.

The court of appeals in Betamax totally overlooked the private nature of the use of the copyrighted materials in its analysis of "the purpose and character of the use," 17 U.S.C. §107(1). The court held that the videotaping of copyrighted telecasts from the public airwaves was not done to further "a traditionally accepted purpose" such as criticism, research or other independent work. 659 F.2d at 972. The court also stated that "[t]he fact that the 'infringing' activity takes places [sic] in the homes does not warrant a blanket exemption from any liability." Id. (emphasis in original). Thus, the court completely ignored the distinction between private use and public performance of a copyrighted work. The "copying" by VTRs is done, and the "copies" viewed, solely within the privacy of the VTR owner's home. There is no publication to the general public of the work as in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), nor any commercial gain to the VTR users, see Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F.Supp. 875, 880 (S.D.Fla. 1978), aff'd, 626 F.2d 1171 (5th Cir. 1980).

Similarly, the Betamax court ignored the fact that the use of VTRs is only for the purpose of obtaining access to the copyrighted material. In this sense, a VTR is no different from the cable television ("CATV") system in Fortnightly Corp. v. United Artists Television, Inc., supra, where the Supreme Court stated that "[e]ssentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signal . . . ." 392 U.S. at 399. A VTR similarly enhances "the viewer's capacity to receive the broadcaster's signal" by enabling the viewer to view the broadcast program at a more convenient time. Like CATV systems, VTRs thus "act only as an extension of a television set's function of converting into images and sounds the signals made available by the broadcasters to the public." Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394, 402-403 (1974). Although Congress changed the application of copyright law to cable television in section 111 of the 1976 Act after Fortnightly and Teleprompter, the Supreme Court's technical analysis of the facts remains valid.

B. The Amount and Substantiality of the Use

As for the second statutory criterion for determining fair use, the amount and substantiality of the material used in relation to the copyrighted work as a whole, the question again is not one of the "use in a competing work" as it normally is in fair use cases, but rather is a question of use as a means of access to the copyrighted work. Although all or substantially all of the copyrighted work may be videotaped by a consumer, this taping or timeshifting may be the only means of access the consumer has to the broadcast. Accordingly, the fact that all of the copyrighted work is "used" cannot be determinative of the issue of fair use when the purpose of the use is merely for access.

C. The Effect of the Use upon the Potential Market

The third criterion is the effect the use will have on a copyright owner's potential market for his work. This criterion in this circumstance is really the effect of access to the work on a copyright owner's potential market for his work. The increased access by the VTR owners allowed by time-shifting, and the resultant larger audience, should increase the income to the copyright holders from their contracts with the broadcasters rather than reduce it. "Today, the larger the audience for the original telecast, the higher the price the [copyright owners] can demand from broadcasters for rerun rights." Universal City Studios, Inc. v. Sony Corp., 480 F.Supp. 429, 466 (C.D. Cal. 1979), rev'd, 659 F.2d 963 (9th Cir. 1981), petition for cert. filed, 50 U.S.L.W. 3768 (U.S. March 12, 1982) (No. 81-1687). "So it would seem that if videorecording becomes very widespread, and can be accounted for in the rating surveys, this increase in total audience size would actually help the copyright holder to earn higher fees from the broadcaster." Glover, Emerging International Copyright Laws on Off-the-Air Home and Educational Video-Recording: An Analysis, 28 BULL. COPR. SOC'Y. 475, 518 (1981) (emphasis in original, footnote omitted). Nielsen and Arbitron, the leading ratings services, already include users of videotape recorders in their audience survey data, so that viewers who watch programs later by means of VTRs are counted in calculating compensation for television program producers. See, e.g., "Video Wars," Washington Post, May 2, 1982, F 1, at F 12, col. 1.

The losses which the copyright owners have claimed they will suffer if consumers are entitled to continue to make videotape recordings of television broadcasts are totally speculative. As the Williams & Wilkins court stated with respect to similar speculation by the publishers in that case:

> It is wrong to measure the detriment to plaintiff by loss of presumed royalty income--a standard which necessarily assumes that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause these practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position, i.e., that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is "unfair."

487 F.2d at 1357 n.19. Similarly, it cannot be assumed that the copyright owners would be harmed economically as a result of home videotaping of their copyrighted works. Their argument that they should somehow be compensated for this means of providing access to their materials puts the cart before the horse and improperly assumes that this means of access is not fair use of their work.

In summary, application of the statutory criteria for determining fair use must be weighted in this instance toward the first criterion, the purpose of the use -- which is to gain access to the broadcast works through home videotaping. Without the use of VTRs, many consumers will not have the access to the broadcast programs which the copyright owners clearly want them to have, and which the First Amendment entitles them to have. See discussion, infra at 23-28.

IV. Other Provisions In The Act Support The Application Of The Fair Use Doctrine To Home Videotape Recorders.

Other provisions in the Copyright Act of 1976 support the designation of private home videotape recording of copyrighted broadcast works as fair use of those copyrighted works. For example, section 106(4) and (5) of the Act provides the exclusive right to perform or display the copyrighted work publicly to the owner of the copyright in the case of literary, musical, dramatic and choreographic works, pantomimes, motion pictures and other audiovisual works. 17 U.S.C. §106(4) and (5). Section 101 of the Act defines "publicly":

> To perform or display a work "publicly" means -
>
> (1) to perform or display it at a place open to the public or any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. §101. This definition means that a VTR owner who replays for his own use or that of his family a videotape of a copyrighted work has not publicly performed that work and thus cannot be deemed to have infringed any of the exclusive rights of the copyright owner enumerated in clauses 4 or 5 of section 106. The House Committee on the Judiciary elaborated on the definition of "public performance":

> Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on the receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in Section 101.

H. R. Rep. No. 1476, 94th Cong., 2d Sess. 63 (1976). See also S. Rep. No. 473, 94th Cong., 1st Sess. 59-60. The House Judiciary Committee also stated:

> [A] performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances gathered." . . . The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private.

Id. at 64. See also S. Rep. No. 473, 94th Cong., 1st Sess. 60-61.

Similarly, in section 110 of the Act, Congress provided that "[n]otwithstanding the provisions of section 106, the following are not infringements of copyright:

* * *

> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless -
>
> (a) a direct charge is made to see or hear the transmission; or
>
> (b) the transmission thus received is further transmitted to the public;

17 U.S.C. §110(5).

In enacting section 110(5), Congress intended that the mere reception in public would not convert an otherwise private use of radio and television broadcasts into public performances for which copyright licenses would be required. Section 110(5) was designed to ensure that the playing of an ordinary radio in a small commercial establishment, as was described in Twentieth Century Music Corp. v. Aiken, supra, would not be considered copyright infringement. H.R. Rep. 1733, 94th Cong., 2d Sess. 75 (1976).

Congress thus has made clear that the private playing of homemade videotape recordings of copyrighted works for the family and its social acquaintances does not infringe the rights of the copyright owner. Therefore, it is only the actual making of the videotapes which arguably might infringe the copyright owner's exclusive rights were it not fair use. In light of Congress' definition of such private use as non-infringing, it is incongruous that the means of obtaining access to this private use should be considered infringement.

In addition, the enactment of the Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391, was a recognition by Congress that the private making of home recordings from copyrighted broadcasts or recordings did not infringe the copyrights on those works. The 1971 amendment was incorporated into the new Act, in section 114.

The Senate Committee reporting on the 1971 amendments indicated that the provisions with regard to home-use recordings were to be merged into the new copyright act when it was finally adopted. S. Rep. No. 72, 92d Cong., 1st Sess. 7-8 (1971); see also Universal City Studios, Inc. v. Sony Corp., supra, 480 F.Supp. at 444. The House Judiciary Committee stated its intention in enacting the 1971 amendment:

> In approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

H. Rep. No. 487, 92d Cong., 1st Sess. 7, reprinted in 1971 U.S. Code Cong. & Ad. News 1566, 1572. There was no suggestion from Congress in 1976 that the legislative intent behind the 1971 amendment had changed when it was included in the new Act. The issue of private noncommercial recording was not addressed in any subsequent Congressional report with respect to the 1976 legislation.

By making clear that holders of copyrights in sound recordings were not to have any "broader rights than are accorded to other copyright proprietors," id., Congress implied that owners of copyrights in sound recordings were to have the same rights as other copyright owners. The expressed reason for enacting the 1971 amendment shows that Congress agreed that personal duplication of a copyrighted work for private noncommercial use does not infringe the work and is fair use.

V. Home Videotaping Serves A Paramount First Amendment Goal Because It Allows New Access To Ideas Transmitted Over The Airwaves.

The Supreme Court has held in a variety of contexts that the First Amendment guarantees the right to listen as well as the right to speak, the right to read as well as the right to print, and the right to receive as well as the right to transmit. E.g., Richmond Newspapers v. Virginia, 448 U.S. 555, 556-567 (1980); First National Bank v. Bellotti, 435 U.S. 765, 783 (1978); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965). See A. Meiklejohn, Political Freedom 25-28 (1960).

The right to receive information has served as a basis for many of the Supreme Court's decisions establishing the right to free speech. For example, the public's First Amendment right to receive ideas was the basis for recognizing the right of the press to attend and publish the results of trials, Richmond Newspapers v. Virginia, supra; the right of businesses to advertise, Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980); First National Bank v. Bellotti, supra; Virginia State Board of

Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Griswold v. Connecticut, 381 U.S. 479, 482 (1965); the right to send uncensored mail, Procunier v. Martinez, 416 U.S. 396 (1974); the right to obtain a temporary non-immigration visa for a speaking engagement, Kleindienst v. Mandel, supra; the right to speak in favor of labor unions, Thomas v. Collins, 323 U.S. 516 (1945); the right to distribute religious handouts, Marsh v. Alabama, 326 U.S. 501 (1946), and Martin v. Struthers, 319 U.S. 141 (1943); and the right to place "for sale" signs in front of homes, Linmark Associations v. Willingboro, 431 U.S. 85 (1977).

Indeed, the right to receive ideas is recognized regardless of their social worth. Stanley v. Georgia, 394 U.S. 557, 564 (1969). "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (citation omitted).

The right to receive information has been particularly protected by the Supreme Court when that information is transmitted over the broadcast media. Due to the scarcity of the broadcast frequencies and the pervasiveness of the medium, the right to receive broadcast information enjoys the broadest First Amendment protection, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), while the right to transmit information over the medium is entitled to the most limited protection, FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1977). Perhaps the most often cited statement of the dominant right of television viewers is Justice White's, in Red Lion, supra:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees. . . . But the people as a whole retain

> their interests in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, and not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

395 U.S. at 390 (citations omitted). As the Supreme Court stated in Teleprompter Corp. v. Columbia Broadcasting System, supra, 415 U.S. at 408: "The privilege of receiving the broadcast electronic signals and of converting them into sights and sounds of the programs inheres in all members of the public who have the means of doing so." See also Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), and Judge Learned Hand's decision in 1942 to uphold the FCC's "chain broadcasting" rules, National Broadcasting Co. v. United States, 47 F. Supp. 940, 946 (S.D.N.Y.), aff'd, 319 U.S. 190 (1943), where he stated: "The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interests, first, of the 'listeners'. . . ."

When the Betamax court concluded that the home videotape recording necessary for time-shifting violated the Copyright Act, it failed to appreciate that the First Amendment protects the right to have access to the media through home videotaping. The court simply noted that "the statute does not list . . .'increased access' as [one of the] purposes within the general scope of fair use." 659 F.2d at 970. The court clearly ignored the First Amendment in stating that, "[i]n this case, there is no corresponding countervailing societal benefit to 'weigh' against the copyright interest of the author." Id. at 971. In addition, the court stated, "[w]e fail to see how the method by which appellants have chosen to distribute their work is relevant. . . ." Id. at 972. These conclusions clearly were erroneous.

Because time-shifting allows new access to broadcast programming by overcoming scheduling limitations that necessarily result from the scarcity of broadcast frequencies, it thereby serves a "paramount" First Amendment goal, Red Lion, supra, 395 U.S. at 390. Obstructing the use of VTRs to time-shift may also violate the user's First Amendment right to "speak" to himself or his family and friends. The fact that the copyright owners choose to broadcast their material over the scarce public airwaves is relevant, and the First Amendment goals served by the increased access to the media allowed by time-shifting are important societal benefits to weigh against the copyright owners' interests.

Courts have recognized the necessity of balancing public interest demands when considering the fair use doctrine. For example, in Rosemont Enterprises v. Random House, Inc., supra, the court refused to enjoin the publication of a biography of Howard Hughes even though the biography contained without authorization articles copyrighted by the plaintiff. The court noted that whether the fair use privilege may be properly applied to a particular situation "turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information. . . ." 366 F.2d at 307. Similarly, in Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968), the court allowed the unauthorized publication of copyrighted pictures of President Kennedy's assassination. The court found that: "There is a public interest in having the fullest information available on the murder of President Kennedy." Id. at 146. See also Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir.), cert.

denied, 379 U.S. 822 (1964); and Meeropol v. Nizer, 361 F.Supp. 1063, 1067-68 (S.D.N.Y. 1973), 417 F.Supp. 1201, 1207 (S.D.N.Y. 1976); aff'd in part, rev'd in part on other grounds, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

The Supreme Court addressed analogous balancing questions in New York Times v. Sullivan, 376 U.S. 254 (1964), and Time, Inc. v. Hill, supra. In New York Times, the Court balanced the First Amendment right of the news media against the demands of a state libel statute and concluded that defamatory statements about public officials could constitutionally be actionable under the state law only if they were made with knowledge of their falsity or in reckless disregard of the truth. Similarly, in Time, Inc., the Court balanced the First Amendment right of the press against the demands of a state privacy statute.

Construction of First Amendment protections consistently with the access obtained by time-shifting requires the finding that home videotaping is fair use of copyrighted telecasts. "The fair use doctrine frequently serves to eliminate potential conflicts between copyright and free speech." Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., supra, 626 F.2d at 1174 (citation omitted). In fact, this issue arguably was settled by the Court in Red Lion, supra, when it held that the public's right to have access to ideas transmitted over the media "may not constitutionally be abridged . . . by Congress . . . ." 395 U.S. at 390. The First Amendment right always should outweigh the interest of the copyright holders in situations such as this one because the copyright holder's interest is purely statutory, unlike the public's right under the First

Amendment. See, The Constitutional Dimension of "Fair Use" in Copyright Law, 50 NOTRE DAME LAW. 790 (1975).

The Copyright Act cannot properly be interpreted so as to require a violation of the First Amendment, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 882 (S.D.Fla. 1978), aff'd, 626 F.2d 1171 (5th Cir. 1980); and see Crowell v. Benson, 285 U.S. 22, 62 (1932); Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 CAL. L. REV. 283 (1979); First Amendment Exception to Copyright: A Proposed Test, 1977 WISC. L. REV. 1158 (1977). Accordingly, the access to television broadcasts provided by the private noncommercial use of VTRs must be deemed to be a non-infringing fair use of the televised copyright material to avoid abridging First Amendment freedoms.

VI. The Compulsory Licensing Proposals Would Impose Liability For Contributory Infringement Where No Primary Infringement Exists.

The compulsory licensing provisions in some of the pending VTR legislation fail to recognize that the use of VTRs to gain access to broadcast copyrighted material is fair use of that material, does not infringe the copyright owner's rights, and therefore does not require a license.

In addition, some of the legislative proposals pending before Congress (e.g., H.R. 5705, Amendment No. 1331 to S. 1758) are also flawed in that while exempting home video recording for private use from liability for copyright infringement, they would impose a compulsory license upon video recording apparatus and the blank tapes or cassettes used in recording. Thus, while the legislation would exempt what it considers to be the primary infringer, it would make the manufacturers and importers of video recording equipment and tape liable as contributory infringers. This approach is completely contrary to basic principles of copyright law.

A contributory infringer has been defined as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . . ." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted). In no case has contributory infringement ever been found where primary infringement did not exist.

For example, in Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra, the manager of a group of concert artists was held liable as a contributory infringer because it organized a community concert association to sponsor a concert series for the artists, knowing that they were performing copyrighted works without authorization. The primary infringement was the unlicensed performance of copyrighted materials by the concert artists.

In Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963), the defendant department store was held liable as a vicarious or contributory infringer for the sale of pirated phonograph records sold by the concessionaire of a leased record department in the store. The primary infringement was the sale of the pirated records by the concessionaire. The piracy of copyrighted songs for use in a record of "20 Original Hits" was the primary infringement in Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 327 F.Supp. 788, 791 (S.D.N.Y. 1971), rev'd on other grounds sub nom., Screen Gems-Columbia Music, Inc. v. Metlis & LeBow Corp., 453 F.2d 552 (2d Cir. 1972). The court there found that an advertising agency was a contributory infringer because it participated in and furthered the infringement of the plaintiff's copyrights by creating advertisements for the records, packaging and mailing the records, and purchasing advertising time from a radio station for the records. See also Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); MacMillan Co. v. I.V.O.W. Corp., 495 F. Supp. 1134, 1146 (D.Vt. 1980).

Similarly, the Betamax court considered the manufacturers of video recorders to be contributory infringers, but only after ruling that individuals using VTRs to copy broadcast material were guilty of primary infringement. 659 F.2d at 975. Even if the Betamax court's analysis of contributory infringement is accepted, the compulsory license legislation still does not make sense. This legislation would penalize the manufacturers who are merely providing the medium to be used by individuals for time-shifting, a purpose which the legislation would recognize as a lawful rather than infringing use of copyrighted material. Therefore, enactment of this legislation would amount to the declaration that it is illegal, without the payment of a license fee, to assist or contribute to the performance of a lawful act. This would be in direct contravention of the legal doctrine that contributory infringement cannot occur unless there is first a primary copyright infringement.

The illogical draftsmanship of the pending compulsory license legislation is emphasized by the peculiar consequences that would follow if, for example, a videotape manufacturer failed to obtain a compulsory license. If these bills are enacted as drafted, such a manufacturer would be an infringer even if the blank tapes were never used. Thus, even though there was no copy, no performance, no display, and no primary infringement of any copyright, the manufacturer would be an infringer. This situation would be totally at odds with the concept of copyright infringement, which requires an act of copying, performance, or display of the copyrighted work. The draftsmen of this legislation do not appear to have considered the basic elements of infringement, or to have considered whose copyright would be infringed under these circumstances or who could enforce the remedies for infringement.

The proposed imposition of compulsory licenses on videotape and videocassettes overlooks the fact that videotape and videocassettes have substantial non-infringing uses. Videotape has been produced and sold for over 25 years, originally for such purposes as recording network programs for later rebroadcast in different time zones and for archival preservation, see 17 U.S.C. §112, and later as a substitute for film in the production of television programs and commercials. Videocassettes, which were developed more recently, are used for educational purposes and to make authorized prerecorded tapes of motion pictures, in addition to their use in VTRs. The American Broadcasting Companies, Inc. ("ABC") recently announced a new service which will make extensive use of blank videotape for authorized copying of television programs. ABC plans to broadcast scrambled programming during the late night hours to subscribers for automatic taping on home recorders for viewing in decoded form during normal hours. "ABC Plans Videotape Service," Washington Post, April 30, 1982, at D 9, col. 1.

Blank tape is thus analogous to blank paper, which can be inserted in a typewriter for use to plagiarize a copyrighted work. Blank videotape no more infringes copyrights than does blank paper. Thus, its makers should not be made liable for copyright infringement any more than should a paper manufacturer.

The proposed legislation states that the Copyright Royalty Tribunal may provide that the importer or manufacturer of blank recording tape can deduct from the compulsory license fees otherwise payable an amount reflecting a reasonable estimate of the videotape distributed by it that is used principally for purposes other than making video recordings by individuals in private homes. Note that the Tribunal is not required to permit such a deduction; the provision is optional.

It obviously would be unfair to charge a royalty for tape that is not used for home taping, and in many instances is not even capable for home use. For example, the same videocassette format sold for VTR use in the home is used to make authorized videotape copies of feature motion pictures for sale or rental. And there are many other examples of clearly lawful uses.

On the other hand, if the Tribunal did allow such a deduction system, it could become an administrative nightmare. The Tribunal already has an unenviable record of delay, inefficiency and expense (which is charged to the compulsory license fund to be distributed). There is no reason to expect anything better from this more complex proposed system for video recording.

Moreover, the compulsory license inevitably will be unfair to the user who does not tape copyrighted programs at home. What of the training course for public speakers where students' performances are videotaped for evaluation, or the amateur photographer who uses videotape only for the purpose of making home movies? And what of all the programming that is either uncopyrighted or is available for copying without objection? The record in the Betamax case established that copyright proprietors in such fields as sports, education, religion and even some entertainment programming consent to home recording by VTRs. See Petition for Cert. at 4, Sony Corp. v. Universal City Studios, Inc. (No. 81-1687, 1981 October Term).

Nevertheless, under the proposed legislation there is no system by which users of blank tape for these and similar purposes can escape the extra charge that the manufacturer will have to include in the price of tape in order to pay the compulsory license royalty. The legislation is defective in ignoring the simple reality that, even assuming the correctness of the Betamax ruling, there are numerous clearly lawful ways to use blank tape. Moreover, this provision merely sidesteps the real problem, which is that the legislation would make it illegal to "contribute" to the performance of a lawful act.

Accordingly, there is no justification for the proposed legislative declaration in these bills that the mere importation, manufacture or distribution of blank videotape is a copyright infringement if the compulsory license requirements are not fulfilled. If enacted, these proposals would mandate illogical and unprecedented guidelines for the courts to follow in the future development of the doctrine of contributory infringement. This legislation totally ignores the doctrine of contributory infringement and purports to establish direct infringement by fiat. If enacted, it almost certainly will be attacked as unconstitutional for this reason.

In summary, the pending compulsory license legislation is flawed in that it would impose liability for contributory infringement where no primary infringement exists because the "primary infringement" -- home videotaping -- would be exempted from copyright liability. This anomaly is even more striking when it is recognized that noncommercial home videotaping to gain access to broadcast copyrighted material is in fact fair use of that material and not an infringement. Accordingly, the only legislation which Congress need enact is a legislative statement recognizing that noncommercial home videotaping of broadcast material is fair use.

Wall Street Journal, Friday, April 30, 1982

Now, Direct From Cattle Country, Heifers and Bulls for Sale on TV

By MARIA T. PADILLA

Staff Reporter of THE WALL STREET JOURNAL

The video craze has struck the nation's stockyards, turning mucky cattle auctions into dressier dos.

Small but growing numbers of auctions are being held in hotels, where an auctioneer peddles the beef via 50-inch screens beaming color videotapes of cattle herds roaming in their natural setting. Prospective buyers, properly attired in Sunday boots and hats, shout their bids between sips of cocktails.

It sure beats the old days when ranchers used "to load them up and drive to Fort Worth or Kansas City," says Everett Salley of United Livestock Marketing, a video auctioneer in McAlester, Okla.

Hotels Smell Better

Video auctioneers claim their method offers numerous advantages over traditional livestock auctions. Ranchers don't have to transport their cattle, which eliminates freight and feed costs, potential contamination problems and weight loss caused by too much jostling. Buyers can see as many as 8,000 head of cattle in five minutes of videotape, compared with about 14 hours to see and auction that number at the stockyards. And, of course, hotels tend to smell better.

But not everybody is sold on the newfangled notion. Some ranchers believe that volatile cattle prices can make it risky to wait the two weeks or so it takes to set up an electronic auction. Still others "feel they can't rely on pictures or descriptions," says Paul Seeley of Electronic Livestock Marketing Inc. in Wichita, Kan. "They'd rather see the cattle."

Cow Eyes and Mad Heifers

In fact, getting good videotape of cattle isn't always a simple matter. Mr. Seeley says he had to replace one cameraman who tended to focus on the animals making cow eyes at him. Kent Johnson of Longhorn Video Co., the production arm of Bob Jessup Videotape Livestock Auction in Oklahoma City, also had trouble with dull footage. Then he discovered that ranchers could coax their cattle into attractive poses by walking across the pasture leaving a trail of feed. Mad heifers and playful young Brahman bulls have been known to butt cameramen.

Despite the problems, video auctioneers contend that they're grabbing a piece of the market. Electronic auctions can now be found in six states, and some concerns see better things ahead. Longhorn Video hopes to sell 40,000 head of cattle this year, double its 1981 sales and triple what it sold in 1980, its first year. In September, the company plans to beam an auction via satellite to 30 or so locations around the country.

And others are looking beyond cattle. Mr. Salley is planning a national video horse show, complete with champagne brunch.

Washington Post Sunday, May, 5, 1982

Firms Commit Annual Reports to Videotape

lowed by pages of financial tables, clarifying (or obfuscating) footnotes, and boilerplate language. This ritual testament to fiscal success (or folly) can run up to 100 pages. The average production cost per copy—not including auditors' fees and the time of executives—is approximately $3, according to Corpcom Services, Inc.

All of the effort is rewarded by just 10 minutes of the average stockholder's time, says Corpcom.

Enter Bruce Pennington of Hay Associates, a consulting firm based here. About two years ago he decided there must be a better way to present a corporate message. Drawing on his background of journalism, corporate communications and broadcasting, he hit upon the idea of transforming a corporation from cold figures on a printed page into warm bodies on a television screen.

This year, a score of Fortune 500 companies are commiting their annual reports to videotape with Pennington's help. Clients include AT&T, Citicorp, W. R. Grace, IBM, Texaco, United Technologies, Xerox, Amax, Bristol-Myers, Burlington Industries, Control Data, Emory Air Freight, McGraw-Edison, Midland Ross and Peat Marwick Mitchell.

While taping corporate information for promotional purposes has become fairly widespread, presentation of annual reports on cable television is a recent phenomenon.

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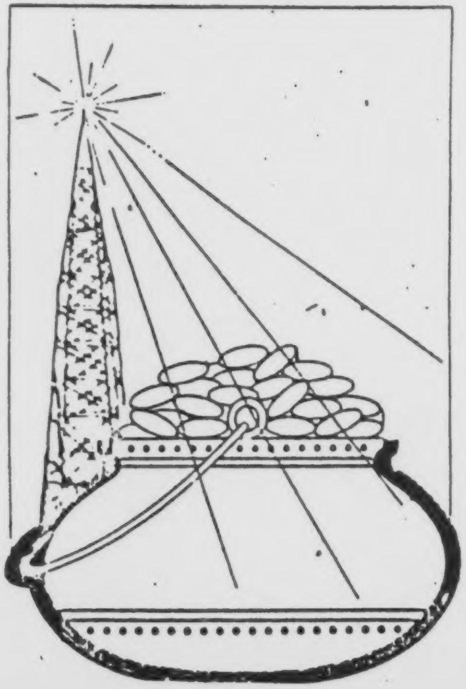
Tribunal Holds Its Own TV Game Show



By Margaret B. Carlson
Legal Times Staff

Despite its lofty title, the Copyright Royalty Tribunal bears less resemblance to an august Roman court of law than to a Turkish bazaar full of squabbling rug merchants.

The subject of the squabbling is a huge pot of money the tribunal must divide each year among producers of copyrighted programs. Instead of dealing directly with each other, cable system operators and program producers deal through the tribunal, which holds the royalty fees cable operators pay for the privilege of retransmitting such programs as the World Series, "The Mary Tyler Moore Show," the NCAA basketball finals, and "Jaws."

In one corner, but bickering among themselves over these royalties, are independent program producers, networks, movie companies, and sports leagues. In the other corner are the cable system operators who don't want to pay any more than they are now paying for the programs they rebroadcast. In the middle, refereeing, is the five-member, presidentially appointed tribunal. Outside the ring, but no less concerned about who gets what share of the lucrative cable television profits, are Congress and the Federal Communications Commission.

On April 9, the D.C. Circuit upheld the tribunal's first distribution of royalties, in which the tribunal awarded the $15 million collected in 1978 (*National Association of Broadcasters v. Copyright Royalty Tribunal*, No. 80-2273, April 9, 1982). The awards were 75 percent to program syndicators and movie producers, 12 percent to sports leagues, 3.25 percent to television broadcasters, 5.25 percent to public television, and 4.5 percent to music claimants.

The tribunal also has authority to slice up the pie among individual claimants in a group if they can't agree on their own. All but the music group did, leaving the tribunal to award the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), and SESAC Inc., respectively, 54 percent, 43 percent and 3 percent of their share.

Five challenges to the tribunal's decision ensued. The National Association of Broadcasters, Joint Sports Claimants (a group of professional baseball, basketball, hockey, and soccer leagues), ASCAP, the Canadian Broadcasting Corporation, and National Public Radio all sued the tribunal. In the five appeals, various parties cross-intervened. The Motion Picture Association of America Inc., the Public Broadcasting Service, the Christian Broadcasting Network Inc., the National Collegiate Athletic Association, and Superstation Inc. also intervened.

Larger Share

While the many parties, their shifting alliances, and the teams of attorneys all with briefs could have made for a complicated ruling, Circuit Judge Abner J. Mikva, in upholding the tribunal, defined the scope of review in one pithy sentence. "Although most of the petitioners challenge the Tribunal's action on both substantive and procedural grounds, it seems clear that these claims are motivated essentially by each petitioner's feeling that it deserved a larger share of the Fund."

It's sorting out these feelings that composes a large part of the tribunal's mission, as set out in the Copyright Act of 1976. Although the agency is young—it just got going in 1977 and came out with its first division of royalties in 1980—it has packed a lot of controversy into a few years. One chairman, Clarence L. James Jr., abruptly quit in 1981 after calling for the agency to be abolished, describing its distribution procedures as "especially unworkable." On James' side are a number of heavyweights—the NAB and the Motion Picture Association, as well as some members of Congress and in part, the chairman of the FCC.

It's easy to see why some critics think the tribunal is not up to its task. Five commissioners and four secretaries make up the entire agency. They go about their appointed task in a tiny corner of a beige brick building in downtown Washington, D.C. No vaulted ceilings or Romanesque arches for this tribunal: instead, brown, narrow hallways, bare walls, cracked linoleum. Offices are identified by scraps of paper taped on the door. Hearings, when they are held, take place in borrowed quarters.

Four of the five current commissioners are Jimmy Carter appointees. Although "their hours are short, the pay is good and there is no heavy lifting," according to one critic of the tribunal, appointments are not eagerly sought.

Former Chairman James says it should be turned into an ad hoc committee and its commissioners paid per diem. "You shouldn't work there 5 percent of the time but get 100 percent of the salary," he says.

Inexperienced Crew

Only one commissioner, Thomas C. Brennan, brings any copyright experience to his job. He was chief counsel of the Senate Judiciary patents, trademarks, and copyrights subcommittee. Frances Garcia, the current chairman (the chairmanship rotates each year), was an accountant in the Austin, Texas, office of Arthur Anderson & Co. May Lou Burg was vice chairman and deputy chairman successively from 1972 to 1977 of the Democratic National Committee and, before that, general sales manager of a radio station in Milwaukee. The fourth Carter appointee, Douglas E. Coulter, lists himself as a freelance writer; his past employment consists of work in the Carter and George McGovern presidential campaigns, a stint in the U.S. Army, and a job as assistant to the financial director of an American corporation in France.

The one Reagan appointee, Edward W. Ray, was president of Eddie Ray Music Enterprises, founder of The Tennessee College for the Recording Arts, a commercial music school, and according to his own description, "involved in the development of successful recording careers for many artists, including Fats Domino, Rick Nelson, the Osmonds and Sammy Davis, Jr."

Sen. Charles Mathias (R-Md.) summed up one view in his address to the NAB at its 1982 convention in Dallas, when he called the tribunal "a resting ground for political hacks."

Although the tribunal's basic mission is a simple one—to divide up the royalties—it must accomplish it amidst a great deal of change in the cable industry and amidst increasing controversy, taking place outside the tribunal, over continuing the current system. Now, cable operators pay a royalty fee, set by Congress, into a fund. The National Association of Broadcasters, the Motion Picture Association, the chairman of the FCC, and a number of members of Congress have proposed that the marketplace determine how much, for example, Ted Turner's Superstation should pay for reruns of "M*A*S*H." Only when cable operators have to pay broadcasters or producers directly for programs will their true market value be realized, their argument goes.

Guidance on Practice

In the meantime, however, the tribunal must accomplish its task. For lawyers with business before the tiny agency, the opinion just handed down by the D.C. Circuit offers some guidance.

The tribunal's legal procedures have been "unconventional," according to Ernest T. Sanchez, of D.C.'s Liberman, Sanchez, and Bentley, attorney for National Public Radio. "The tribunal has said, 'We will follow the [Administrative Procedure Act] for certain purposes, but when we don't want to, we don't have to.' The court slapped the tribunal's hand for that attitude. We might be seeing more regularized procedures over there. What the place needs now is a lawyer."

(NPR won the only remand. The appeals court ruled that the record did not clearly indicate whether the tribunal had complied with the Government in the Sunshine Act. The tribunal gave NPR no share of the royalties.)

Another attorney in the case fears the court did not give as much guidance to the tribunal as it could have. David H. Lloyd of Arnold & Porter, representing Major League Baseball, got what he wanted—a ruling that baseball should have gotten all of the royalties for retransmission of their games and that the broadcasters rightfully got none. But the court based its decision on the facts of the tribunal's 1978 record and did not make any further ruling. According to Lloyd, "this leaves the door arguably open for the broadcasters to come in again and ask for part of the royalties."

As the pool of money generated by the retransmission of programs by cable continues to grow, the amount and the way it gets divided by the tribunal will continue to be the subject of intense debate. The marketplace solution—let the cable operators pay what the market will bear—has considerable support, but the cable industry, growing in size and clout, wants the system to stay the way it is.

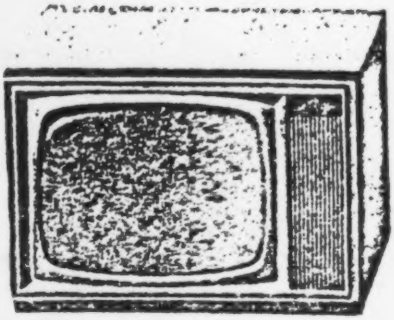
The House Judiciary courts subcommittee has just reported out a bill, H.R. 3560 that ratifies a compromise negotiated by the three major interest groups—the cable operators, the broadcasters, and the movie producers. The compromise would continue to allow cable stations access to an unlimited number of signals and the cable operators would continue to pay royalties to the tribunal rather than negotiating directly and separately with individual programmers. But noncable interests would get an exclusivity rule: if a noncable station has contracted to show a given program in an area, it will be protected against a cable competitor offering the same show. A local independent station could get a similar protection for up to 300 movies each quarter.

That bill has several hurdles to clear. One FCC staffer, who supports the bill but feels that the cable operators should be paying much more for the programs they show, cautions against moving too fast. "Remember the days when radio stations were told for the first time that they had to pay [negotiated] royalties [to composers] into the ASCAP fund every time they played a copyrighted record. They couldn't adjust to the financial shock so they only played music already in the public domain and no longer copyrighted. For about a year, all we heard was 'Jeannie with the Light Brown Hair.' " ■

HOW HOLLYWOOD STUDIOS FLIMFLAM THEIR STARS

Outraged performers—claiming they've been cheated out of profits—are suing studios for millions

By Frank Swertlow



Fess Parker swings a red Chevy pickup truck around the circular driveway leading to his two-story Spanish-style house in the rolling hills above Santa Barbara, Cal. In the distance, through the smoky mist, President Reagan's ranch can be seen, nestled on the crest of a nearby mountain. For a few years, Parker was probably the more famous of the two—back when he played Davy Crockett for Walt Disney and became one of television's first folk heroes and superstars. Now, at 57, he is a successful real-estate developer, whose 6-feet-5-inches are more comfortable in gray flannel and wingtips than buckskin and moccasins. To Parker, these days, Hollywood is just another part of Los Angeles. He doesn't talk about television. At least, most of the time. On those occasions when he does, it is with anger—not an anger that erupts in rage, but a cool, unrelenting anger that brings to mind the old Davy Crockett motto: "Make sure you are right, then go ahead."

Fess Parker's anger flows from a classic Hollywood confrontation: the actor versus the studios and production companies. He asserts he is a victim of an industry flimflam known as "creative bookkeeping"—accounting practices insuring that no matter how successful a TV series or film is, it will never earn a nickel for any actor, writer, director or producer who is supposed to share in the profits. Too often, these "profit participants" read about the millions of dollars their productions have made, only to find out—in vague, one-page profit statements—that their 10, 20, 30 or even 70 per cent of the profits has been eroded by a series of expenditures that will keep the project forever in the red.

In Parker's case, he and his partner, the late producer Aaron Rosenberg, signed for nearly two-thirds of the net profits from *Daniel Boone*, a one-hour adventure produced at 20th Century-Fox for NBC. The series lasted six years in prime time, then moved into successful syndication and, according to Parker, "earned $40 million gross to date. Between us, Aaron and I, we did not get two cents. Something is wrong."

Fess Parker is suing Fox for $48 million. "What we are going to learn," he alleges, "and are going to try to prove, is that there is a systematic, well-thought-out program of fraud and deceit [involved]."

Parker is lucky; he's a successful businessman. But many performers, he says, fall on hard times after their initial fame. Their faces are famous but they have no careers and, thanks to creative bookkeepers, no bank accounts. "I feel compassion for all the people who have had this same hope that I have: of sharing in the profits. That's part of the American dream. And when you get it, and it is dross, it is a little disappointing."

More and more writers, directors and actors are going on record with claims that Hollywood accountants have cheated them. James Garner is considering suing Universal over *The Rockford Files*, a series that reportedly has earned $52 million in sales here and abroad. What has Garner received? "Not a dime," the actor has said. According to Garner, the studio says the series is millions of dollars in the red; "I know that it is inequitable. I know that it is immoral—the practices they have in bookkeeping. I don't know if it is illegal, because I am not a lawyer. But I do know that I have seen people work themselves practically into the grave. And they have no career when [the series] is over and there is no profit."

Gene Reynolds went to court to get 20th Century-Fox to open its books on the old ABC series, *Room 222*. The list goes on, in movies as well as television: Sean Connery and Michael Caine have sued Allied Artists, alleging they were denied some of their profits from "The Man Who Would Be King." Sir Richard Attenborough is suing producer Joseph E. Levine, claiming he was cheated out of $200,000 in profits from the film "A Bridge Too Far." Alistair MacLean has gone to court, maintaining that producers Elliott Kastner and Jerry Gershwin owe him more than $250,000 in profits from "Where Eagles Dare."

"Profit participation is another word for cheated," says producer Sherwood Schwartz, who had 30 per cent of *Gilligan's Island*, one of the all-time hits in syndication, and who did not receive any money until an out-of-court legal settlement. "I don't know more than half a dozen people," he says, "who collected penny one." Another series that is playing from sunrise to sunrise around the globe is *I Dream of Jeannie*. Sidney Sheldon, who wrote, created and produced it, owned 50 per cent of this series and received no profits until he complained. Sheldon says he finally sold out his interest for more than $1 million, a hefty sum, but probably a fraction of what he'd thought his 50 per cent would amount to.

In the most famous tale of creative bookkeeping, producers Aaron Spelling and Leonard Goldberg were investigated for diverting funds from *Charlie's Angels* to another series, *Starsky & Hutch*. Spelling and Goldberg, who were never charged, have since reached agreements with their *Charlie's Angels* partners, quashing any civil suits. Two of the four partners—Robert Wagner and the late Natalie Wood—received an undisclosed settlement. The others, screenwriters Ivan Goff and Ben Roberts, will share more than $1 million over the next five years. "More and more the industry takes a view that you aren't going to get your fair share," says Goff. "That's the price you have to pay for working here."

But not everybody sues or even threatens to sue. Not Peter Graves, who has received nothing for his share of *Mission: Impossible*. Nor Mike Connors, who has received nothing from *Mannix*. William Link and Richard Levinson, who have profit participation deals on 14 series, including *Columbo*, *Mannix* and *McCloud*, have never seen any profits from their work. Robert Blake has received no profits from *Baretta*. Says Larry Thompson, Blake's business manager: "Litigation is not fun; it is costly, emotionally draining and time consuming. And don't forget, there are three networks and six studios. When you sue one, that increases the possibility that you might not work at all."

A growing number of actors, writers and producers now refuse profit participation. To be the star of *Today's FBI*, Mike Connors took all his money up front. Mort Lachman, a veteran comedy writer who has produced such series as *Archie Bunker's Place*, prefers cash, too. "The studios kill you," says Lachman. "Most of the creativity in Hollywood is in the accounting department."

Profit participation sometimes seems like a shell game and other times like a tough, legitimate way of doing business, but with a motto: "Let the buyer beware." It is a complex game with a simple premise: that the creative person agrees to take a share in the profits, usually in return for accepting a lower salary. Fess Parker was paid about $5000 per episode to play Daniel Boone. He could have commanded two or three times as much, but he chose a lower fee for a 40-per-cent cut of the net profits.

"Profit participation is another way to say, 'I don't want to pay your fee'," says Larry Thompson, who with his partner Jay Bernstein manages the careers of Robert Blake, Karen Grassle and William Shatner. "The studio then says, 'I'll pay you less and make you a profit participant.' It's alluring." "To the uninitiated," says Frank Pierson, the president of the Writers Guild of America West, "it means they are partners with the studio."

At Universal, profit participants are not partners. "Absolutely not," says Sidney Sheinberg, president of MCA, Universal's parent corporation, and the only studio chief willing to discuss profit participation. "If they are partners, they are going to bear the loss. It is an added compensation that may or may not be paid, depending on how successful the show is, how much the show costs; and it is that simple. . . . If the revenues exceed the costs—as we define them—you are going to get a bonus in dollars."

If revenues exceed the costs—*as we define them.* That is the key. As *we* define the costs. A profit-participation agreement can run as long as 50 pages. The wording of a phrase could mean the difference between the gain or loss of →

millions of dollars. Some percentages are based on gross sales; others are based on net profits. Frequently one profit participant has a different arrangement from another. For *Charlie's Angels*, Robert Wagner and Natalie Wood had 47½ per cent of the net while Ivan Goff and Ben Roberts, the writers, had five per cent. In 1980 the writers received a profit-participation statement that said the series was in the red by $17 million. The Wagners' statement put losses at $1 million. "The Wagners had more clout," says Len Hill, a former head of ABC's TV-movie department and now an independent producer. "They excluded certain costs in their definition that Goff and Roberts didn't." If revenues exceed the costs—as *we* define them.

The best piece of the action is a percentage of gross sales. Few have that. David Wolper does. And Clint Eastwood. And Burt Reynolds. "Grosses are public knowledge," says Robert Leeper Jr., a former executive at both Universal and Fox. "Grosses do not suffer hidden costs. Grosses do not get depleted by a 10-per-cent sales fee or by a 40-per-cent distribution fee. Grosses are pure and simple. They are grosses."

Net profits—what Leeper calls "the standard definition of profits"—lead to creative accounting. To reach those profits—the difference between revenues and costs—a tangle of expenditures (as the studio defines them) must be unraveled.

Consider a sample presented by Leeper. Say a studio claims a production cost of $10 million for the first year of a one-hour series. According to Leeper, usually "70 per cent of those are hard, or actual, costs"—for such items as sets, lights and film—but the remaining 30 per cent includes studio charges for overhead such as the studio's parking lots and offices. Some people suggest that the 30 per cent for providing goods and services is *all* profit for the studio.

If the network carrying the $10-million show pays $8 million for the series the first year, then the series has lost $2 million for the year. If the series is a hit and runs for five years on that basis, it means that on the books, technically, the hit series has lost $10 million in production costs alone. There are other charges, too. The studio also gives itself 10 per cent as a commission for "selling" the series to the network. That's $800,000 a year—an additional $4 million in costs over five years, plunging the series $14 million in the hole on the books. The studio then charges the show interest on these losses. Say that, over the five years, with a fluctuating prime rate, the interest has amounted to $2.2 million. The series is now $16.2 million in the red.

Conventional wisdom holds, however, that red turns to black when a syndication deal is made. So now, the 125 episodes produced over the five years are sold for a total of $100,000 per episode—a grand total of $12.5 million. The profit participant may think that the series' deficit has now been reduced to $3.7 million, and that he is on the verge of turning a profit. Wrong. Forty per cent of the syndication revenue is lost to the distribution fee—the money the studio gives itself for selling the show to stations buying the reruns. In this case, that's $5 million. The remaining $7.5 million is then deducted, leaving the series $8.7 million in the red. The studio then charges the series what are called "actual costs" for distributing the series to syndication. They include costs for editing, making prints and negatives, costs for shipping the series to stations buying the reruns. These "actual costs" may amount to another $1.3 million. So our one-hour series is still $10 million in the red. "Then you drop in another interest factor at prime," says Leeper. "You never get out." All of these are costs. As *we* define them.

"Most agents who negotiate these deals don't really know how these deals work when you unravel them," Leeper says. "I think there are certain auditors who do; certain lawyers, certain accountants who understand this. But the problem is that no one has ever taken the time or the effort, I don't care how big the star or the director, to understand how it works." →

Universal's Sheinberg doesn't buy the argument that stars are ignorant about their contracts. Creative people who squawk about receiving no profits are "crybabies," says Sheinberg: "Contracts are pretty complicated documents. The definition of profits is pretty complicated. They presumably hire people to represent them. If you are a dumb or uneducated kid who stumbles in from the hills of Kentucky, maybe you can say, 'Who, me? I didn't know what I was signing.' But you can't come represented by a major agency, have your business manager, the finest set of lawyers in the country, negotiate these contracts, then claim, 'I didn't know what I signed.' I mean at that point, if you didn't know—tough."

Despite the deficits reported on profit-participation sheets, are the studios making money? Consider again our one-hour series, which costs $10 million a year to make. Remember that only 70 per cent of the production costs were hard costs—that is, costs actually paid out, as for film or props—and that 30 per cent includes profits the studio made in providing these goods and services. Let's say the profits are not as high as the full 30 per cent, as some people claim. Let's say they are—and this is conservative—20 per cent. Eliminating that 20-per-cent profit in the production costs—which amounts to $2-million a year—the studio has spent $40-million in real dollars for the making of the series over five years and collected $40-million from the network.

So while the studio is at break-even, *before* collecting its massive distribution and syndication money, the profit participant sees only red. And continues to see red as the studio collects millions of dollars in syndication and distribution revenues. Sheinberg acknowledges this. "Profitability for the studio has nothing to do with the way you define profits for the profit participant.The participants of profits are defined in accordance with the contract you have with them. . . . The fact that a TV series does not generate a series profit, as defined by our agreement with a creative element . . . doesn't mean that that series on an overall basis doesn't contribute to the absorption of overhead or to the profitability of MCA. And there is nothing nefarious about that."

A common complaint from profit participants is that they are denied access to the books; in other words, they are not allowed to see where their money has been spent. Many of them, however, have foolishly agreed in their contracts that they will receive a profit statement only when "the project reaches profit"; the accountants at the studio report no profits, and so, no statement is sent. Some participants have contracts that say a statement must be sent every quarter, but most often they receive a statement once a year or, sometimes, twice. Lillian Gallo, who is concerned about the profits from her TV-movie "Hustling," says she has received only vague statements from Filmways, which produced the movie. "If I had to describe it," she says, "I'd say they were stringing me along."

Larry Thompson says the stalling has a purpose. "In times of tight money," he says, "the attitude is, 'OK, we will give the participants what we think they should get. If they don't like it, let them audit. It will take two years and we will keep the interest'."

When they do see the books, profit participants often question the charges, particularly the fees the studios charge for distributing a series to syndication—30 or 40 per cent in the United States and 50 per cent elsewhere. Bill Finnegan, who produced the movie "World War III" for NBC, is distributing the show himself. "He made one phone call to Canada and he sold it for $65,000," says a producer friend of Finnegan's. "One phone call. That's the price." If Finnegan had let a studio distribute the film, one-half of the $65,000 would have gone to the studio as a distribution fee. Then there would have been separate charges for advertising, publicity and making prints.

There are questions about other charges, too. "We once did a series," says Richard Levinson, "where we were charged for the use of a sound stage. We had shot on location. Another time, we were charged $5000 for a door. I said, 'Scratch the door.' They did. They dropped $300 from the budget. You are dealing with traditional industry practices."

It is not the legality of the charges but the razzle-dazzle that usually is questioned. Len Hill, for one, thinks studios prices are inflated and not competitive with prices outside. "They are not going to go out into the marketplace and look for the best price," says Hill.

Some people do get profits. Sherwood Schwartz says he is getting money from

The Brady Bunch. Andy Griffith got profits from his shows. So did Jim Nabors. So did Don Adams for *Get Smart!* What are the ways to beat the system? One way has been to do what David Wolper and Lillian Gallo do—get a percentage of the *gross*. Another way is to do what Robert Conrad does—assume financial risk himself.

If one does not get a "risk deal" or a "gross deal," the only other way to try to get profits is to whittle away at the "net-profit definition." But this depends on clout: how badly does a network or a studio want a writer, director, actor or producer? It also depends on the experience of the negotiator and, it seems, the experience of the creative person. Len Hill says independent producers often offer the best financial deals because they want to attract talented people. Lillian Gallo, for example, speaks admiringly of MTM. "It is the best place to work," she says. "They charge no overhead and no 10-per-cent sales fee."

Another alternative is renegotiation, most commonly accomplished by walking off the set of a hit series. Says a Beverly Hills lawyer, "You have to realize this is a game. My clients start out in an inequitable position. So we wait, and the moment we have leverage, we act."

The creative unions in Hollywood unanimously favor one solution to the problem of profit participation: a uniform definition of profits. "Everybody will know within reason what the expectations are," says Michael Franklin, an officer of the Directors Guild. "If you make a deal now at Universal, it is one thing. If you make the same deal at Paramount for 20-per-cent overhead, it will mean something else. People will know the likelihood for scoring and getting money. They will know whether or not they should take a profit-percentage deal. I think that the industry is being ill served without this. They don't need a reputation for making deals that are unethical and improper."

Fess Parker has spent three years chasing his profits at 20th Century-Fox. He spent a year in law school in his youth and enjoys reading the briefs filed by his lawyer, Charles Bargiel, and Fox's responses. He is an expert on profit participation. But he learned the hard way. He now knows the game and the way it is played. But he doesn't think, even with all his experience, that he could beat the system. "No," says Parker, "I don't think I could. I am sorry to say that. I think the whole process is corrupt."

Charles Bargiel is more cynical. "I think there is going to be a transition among the creative people," he says, "where they will go for a gross deal." And then, he says, the definition of gross will change, and will have the same results as today's net deals. So, says Bargiel, the *good* deal will need a new name: "Someone will come up with a phrase, 'a true gross deal'." And that will be OK for a while, until they change the ground rules on it. So, "after that you'll see someone come up with a 'true, true gross deal' and then a 'true, true, absolutely true gross deal; honest, cross-my-heart deal'." And, says Bargiel, in the end "the results will all be the same: the studio wins."

TV GUIDE MAY 1, 1982

No. 81-1687

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,
v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF OF *AMICI CURIAE* VIRGINIA CITIZENS' CONSUMER COUNCIL, INC., ARIZONA CONSUMER COUNCIL, IDAHO CONSUMER AFFAIRS, INC., ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC., NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP, MINNESOTA PUBLIC INTEREST RESEARCH GROUP, OAKLAND ALAMEDA COUNTY CONSUMER COUNCIL, RHODE ISLAND CONSUMER COUNCIL, THE CENTER FOR CONSUMER AFFAIRS, THE UNITED STATES CONSUMER ASSOCIATION, EDWARD GREENSFELDER, JR., WILLIAM C. McLAUGHLIN, ROBERT McEWEN AND JUDY BRAIMAN-LIPSON ON BEHALF OF VIDEO CASSETTE RECORDER OWNERS AND USERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. DOBROVIR
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BRIEF OF *AMICI CURIAE* VIRGINIA CITIZENS' CONSUMER COUNCIL, INC., ARIZONA CONSUMER COUNCIL, IDAHO CONSUMER AFFAIRS, INC., ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC., NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP, MINNESOTA PUBLIC INTEREST RESEARCH GROUP, OAKLAND ALAMEDA COUNTY CONSUMER COUNCIL, RHODE ISLAND CONSUMER COUNCIL, THE CENTER FOR CONSUMER AFFAIRS, THE UNITED STATES CONSUMER ASSOCIATION, EDWARD GREENSFELDER, JR., WILLIAM C. McLAUGHLIN, ROBERT McEWEN AND JUDY BRAIMAN-LIPSON ON BEHALF OF VIDEO CASSETTE RECORDER OWNERS AND USERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Amici curiae, individuals and nonprofit organizations representing present and future video cassette recorder (VCR) owners and users urge the Court to grant certiorari and reverse the Ninth Circuit's decision. This brief is filed with the written consent of all parties, on file with the Clerk.

INTEREST OF AMICI

The Virginia Citizens Consumer Council, Inc. (VCCC), Arizona Consumer Council (ACC), Idaho Consumer Affairs, Inc. (ICA), Association of Massachusetts Consumers, Inc., North Carolina Public Interest Research Group and Minnesota Public Interest Research Group are non-profit, non-partisan, voluntary statewide associations of citizens which advocate and represent the interests of American consumers before courts, legislatures, and administrative agencies and educate the public on consumers' rights. They have active memberships of 560, 1500, 200, 200, 7,000 and 40,000 respectively. VCCC represented consumer interests in the landmark case of *Virginia Citizens' Consumer Council, Inc. v. State Board of Pharmacy,* 425 U.S. 748 (1976). ICA is an affiliate of the Consumer Federation of America which, with 30 million members, is the largest national consumer membership organization in the United States.

Oakland Alameda County Consumer Council (OACCC) and Rhode Island Consumer Council (RICC) are government chartered and funded nonprofit organizations. OACCC serves the 1.1-million residents of Alameda County, CA, with consumer education, complaint assistance and coordination with local businesses and federal, state and local government agencies. RICC was created in 1966 to advocate the interests of Rhode Island's 950,000 citizens on consumer issues, promote consumer education and represent consumers with respect to state and federal regulation and legislation. The Center for Consumer Affairs is incorporated "to advocate legislative reforms in consumer affairs, litigate where appropriate in the public interest, to educate the public generally about consumer matters to make them more effective in the marketplace . . ." in the State of Alabama. The United States Consumer Association has 50,000 members. Its newsletter *Wise Consumer* informs the public about issues of concern to consumers, its Consumer Protection Bureau acts as an advocate for consumers on issues with dealers, distributors and manufacturers of consumer products and its buyer referral and other services enable its members to purchase consumer products, including VCR's, on favorable terms.

Edward Greensfelder, Jr., William C. McLaughlin, Robert McEwen and Judy Braiman-Lipson are residents of Washington, D.C., Western Springs, IL, Boston, MA and Rochester, NY, respectively. Greensfelder and McLaughlin are VCR owners; Greensfelder uses his both in his law practice (e.g., for showing videotapes of surgical operations in preparing for and conducting litigation) and at home, in taping programs for later viewing by himself and his family. McLaughlin uses his VCR for home use exclusively, taping programs for later one-time viewing by himself and his family; he does not keep any program recorded for more than a few days, consistently erasing and reusing his cassettes. McEwen and Braiman-Lipson have used VCR's owned by others and are potential purchasers. All four are consumers and citizens of the United States and oppose the Ninth Circuit's restriction of their right to purchase and use Video Cassette Recorders (VCR's).[1]

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[1] VCC, ACC, AMC and RICC as organizations and McEwen as an individual, with others, have organized the Consumer Recording Rights

Each of the amici has a strong interest in the outcome of this litigation. They, their members and those they represent own, use or intend to own or use VCR's in the various ways described in this brief. The Ninth Circuit's decision declared such ownership and use unlawful under the copyright laws, gravely affecting the rights of existing and future owners and users of VCR's.

SUMMARY

I.

The Ninth Circuit's ruling was of breathtaking and unprecedented sweep. It declared ten million Americans, owners and users of VCR's, to be lawbreakers: violators of the copyrights of plaintiff-respondents, movie producers. The decision could deprive Americans of the benefits of a new and useful technology by enjoining future sales of VCR's and video cassette tapes. It could make all presently owned VCR's expensive artifacts by enjoining sale of video cassette tapes. It could result in a prohibitive statutory penalty of $250 for each future use of a VCR. Even more intrusively, the ruling could compel the destruction of cassettes already recorded in the homes of VCR owners and users. And the Ninth Circuit's ruling could result in a federal District Court becoming a judge-created VCR Copyright Royalty Tribunal with the day-to-day duty of imposing royalty fees on VCR's and blank tapes, establishing royalty fees, prescribing how such fees would be collected and from whom and deciding how, to whom and in what amounts those royalties would be disbursed.

II.

The Ninth Circuit's ruling will inevitably abridge VCR owners' and users' constitutionally guaranteed interests in access to information and creative expression; their right to receive, use and communicate information freely committed to the public domain. This Court has long recognized the paramount First

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Committee, as an affiliate of the Home Recording Rights Coalition (HRRC). HRRC is a coalition of VCR and tape owners, users, manufacturers, dealers and distributors and organizations and associations representing them; it has sponsored the preparation and filing of this brief by the amici named in the title.

Amendment interests of the public in matters related to broadcasting, *C.B.S., Inc. v. Democratic National Committee,* 412 U.S. 94, 112-13 (1973); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390 (1969), and the precious right of privacy in the home, *Stanley v. Georgia,* 394 U.S. 557, 565 (1969). Yet in violation of these rights the Ninth Circuit's bailiff could intrude into millions of American homes, becoming in fact the cartoonists' fancied "video policeman."

The Ninth Circuit did this in a lawsuit where the plaintiffs collusively had joined a friendly VCR owner and user as a defendant. This precluded any effective, adversary defense of owners' and users' interests and so the Ninth Circuit considered neither the extensive, important uses of VCR's that do not involve the recording of copyrighted materials off-the-air at all nor the vast majority even of recording of copyrighted material for later viewing, which is so performed as to make it fair use under the copyright law.

III.

The Ninth Circuit ordered the district court to consider establishing itself as a royalty tribunal, imposing a "tax" on petitioners and redistributing the money to respondents. That is doubtless the relief respondents seek; only such relief would satisfy their desire for enrichment. But for a court to do this would be to usurp functions committed to the legislative branch by Article II and to overstep the bounds set on the federal courts by Article III. The Court would not merely open but dive head first into a Pandora's box of constant judicial intrusion into the myriad transactions of a number of complex, pervasive industries that touch the lives of Americans many times a day. The court would be forced to weigh developments in a fast-changing field of technology without the benefit of the array of information a legislature needs and can command and without the expertise of a specialized administrative body. And it would be doing so when the Congress has already begun the very legislative process that the Ninth Circuit's decision would short-circuit.

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case, supplementing it only to highlight the effect of the Ninth Circuit's decision on

VCR owners and users.

Americans have bought more than three million VCR's.[2] Over 10 million Americans use VCR equipment and the number has been increasing.[3] The Ninth Circuit's decision labelled these 10 million as lawbreakers: copyright infringers who "trammel on legally recognized rights in intellectual property", Pet. App. A 19,[4] when they copy TV programs "in their own homes for private noncommercial use," *id.* 12. It held that their use of VCR's was not a "productive use", *id.* 18, based on its assumption that a VCR's only use was "the copying of entertainment works for convenience", *id.* 19, not the copying of "informational type works", *id.* 20. The court seemed to assume that 10 million Americans use VCR's exclusively to record multiple copies of "Chip and Dale/Mixed Nuts", a cartoon program. The court considered this activity to be of "no . . . societal benefit," *id.* 16, and hence could find its ending or penalization by injunction or fine to bear no "deleterious consequences of reduced access." *Id.* 17.

As for relief, the Ninth Circuit had several suggestions. One was statutory damages, Pet. App. A 28, which at the copyright owner's election can be assessed against any "infringer" — that is, any VCR owner or user who copies a work, and in a minimum amount of $250. 17 U.S.C. § 504(c)(1). Although respondents have shown no "measurable monetary damage, economic loss or revenue loss," Pet. App. B 50, if the Ninth Circuit's decision stands respondents could demand fines in future lawsuits that, if each of 3.5 million VCR families had copied only one program, would add to $875 million.

The Ninth Circuit also suggested injunctive relief. Pet. App. A 28. An injunction against future sale of VCR's and blank tapes would deprive 220 million Americans of the benefits of this new technology. Injunction against home use of VCR's involves potential intrusions into privacy that are frightening to contemplate. Such intrusions are second in gravity only to the seizure or destruction of recorded tapes in owners' homes, 17 U.S.C. § 503, which the Ninth Circuit did not mention but did not foreclose, Pet. App. A 28.

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[2] Television Digest (December 14, 1981).

[3] Media Statistics, *The Video Cassette Recorder, Spring 1980,* 7, 27, 28 (July 1980). Note, *Home Videorecording: Fair Use or Infringement?,* 52 So. CAL. L. REV. 573, 576-77 (1979); "VTR's Breaking and Entering the Home Market," BROADCASTING 28, 32 (October 24, 1977).

[4] *Quoting* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979).

The Ninth Circuit's last suggestion was judicial creation and administration of a "continuing royalty" system. Citing no authority save a treatise which proposed, hypothetically, "a judicially created compulsory license", the court altogether ignored how a district judge would perform such a function, obtain jurisdiction over every "infringing" VCR user, collect the royalties, distribute them — or defray the expenses of such an effort. Pet. App. A 28-29.

The Ninth Circuit's ruling affects only one brand of VCR's, but if it stands as precedent, all VCR owners and users will be subject to the sanctions of a lawsuit respondents have filed against all other VCR manufacturers. Pet. 7, 12 n. 16 ("the RCA case"). While here a friendly VCR owner was collusively named as a defendant (*see* pp. 7-9, *infra*), in the RCA case no owner/user defendant is named, as respondents seek again to avoid any effective defense of consumers' interests and rights.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Disregarded VCR Users' First Amendment Rights in a Case Where their Interests Were Neither Effectively Presented nor Argued, and Ignored Compelling Evidence Supporting their Interests

A. This Is An Important First Amendment Case

In balancing the competing interests of listeners and viewers against those of broadcasters, this Court has long held that "the right of the viewers and the listeners . . . is paramount," *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390 (1969); *see F.C.C. v. Allentown Broadcasting Corp.,* 349 U.S. 358, 361-62 (1955); *F.C.C. v. Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940). The Court tilts the balance in favor of the "right of the public to be informed," *C.B.S., Inc. v. Democratic National Committee,* 412 U.S. 94, 112-13 (1973), refusing to "countenance monopolization of [the] market [of ideas]". *Red Lion, id.* VCR use, which extends and enhances viewers' receipt of communication, involves not only these First Amendment interests but also the viewers' "right to . . . observe what he pleases – the right to satisfy his intellectual and emotional needs in the privacy of his own home," *Stanley v. Georgia,* 394 U.S. 557, 565 (1969), and to an "uninhibited marketplace" of programming that suits personal intellectual needs and tastes. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. at 390.

The Ninth Circuit brushed these significant First Amendment concerns aside in a sentence, holding them "wholly without merit". App. A 19. It dismissed VCR owners' constitutional rights absent effective consumer representation and absent substantial evidence in support of the First Amendment interests involved.

B. The Rights of VCR Owners and Users, the Parties Most Vitally Affected by the Ninth Circuit's Decision, Were Adjudicated in a Collusive Lawsuit.

The Ninth Circuit dismissed the value and importance of home VCR use, branded VCR owners outlaws and approved a not so-fanciful "video police" (see Appendix B to this brief), without any effective opportunity for VCR owner-users to defend their rights. Aside from one brief reference in the district court's opinion (Pet. App. B 43; the Ninth Circuit ignored even this), there was no evidence below of the many non-infringing uses of VCR's. The reason is apparent: respondents collusively excluded real representation of consumer interests from the case.

The only VCR owner-user named as a defendant below was one William Griffiths, "a client of plaintiffs' [here respondents'] law firm" who "consented to being a defendant." Respondents had "waived any claim for damages or costs against Griffiths . . . never expected him to be represented by counsel" and he was not. Pet. App. B 43-44.

Respondents' puppet presented no evidence and made no argument for use of VCR's either as not infringing at all or as fair use (*see* pp. 8-14, *infra*). No lawyer argued the case for VCR owners and users. For the interests of *amici* and 10 million VCR users this was a feigned case, an improper vehicle for judicial resolution of important public issues, lacking the "honest and actual antagonistic assertion of rights" indispensable to the adversary process. *United States v. Johnson,* 319 U.S. 302, 304-05 (1943), *quoting Chicago & G.T. Ry. Co. v. Wellman,* 143 U.S. 339 (1892).

No matter how vigorous the adversary contest between petitioners and respondents, it could not include adversary presentation of VCR consumers' position on issues directly affecting them, issues that the Ninth Circuit decided.[5] *See McGowan v. Maryland,* 366 U.S. 420 (1961) (store cannot raise consumers' First Amendment challenge to blue law); *Tileston v. Ullman,* 318 U.S. 44 (1943); *see also United States v. Raines,* 362 U.S. 17, 21 (1960). In sum, respondents' collusion placed "the public interest . . . at hazard." *United States v. Johnson,* 319 U.S. at 305.

C. VCR's Have Uses of Significant Value to Society That Are Entitled to First Amendment Protection and Do Not Infringe Copyright

1. Copyrighted Broadcasts and "Time-Shifting"

The only use of VCR's in which respondents have a legitimate interest is the recording of copyrighted programs directly from the air waves. The overwhelming use of VCR's for such off-the-air recording is "time-shifting," onetime recording for later viewing, then erased so the tape can be reused. Pet. App. B 43, 46 (Lowe), 47 (Soule), 47-48 (survey), 81-82, 108-112.

The Ninth Circuit dismissed First Amendment interests by trivializing this use of VCR's. The only example it cared to mention was the recording of a cartoon, "Chip and Dale/Mixed Nuts," a matter of little or no "benefit to society", Pet. App. A 16, and hence unworthy of balancing in First Amendment scales. But a glance at the TV programming available in the Washington, D.C. TV market during a typical week in March 1982 gives a vastly different impression. *See* Appendix A to this brief. Significant informational, educational, scientific and cultural programs abound, whose copying even the Ninth Circuit could not deny benefits society and fits within the "non-profit educational" purposes of criticism, comment, teaching, scholarship, and research protected by the fair use doctrine, 17 U.S.C. § 107, and within the First Amendment interests recognized in *C.B.S., Inc. v. Democratic National Committee* and *Red Lion*.

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[5] Obviously respondents' targets in their infringement campaign are "deep pocket" manufacturers and distributors like petitioners. Yet if VCR use is infringement, VCR users are the primary infringers and petitioners are only "contributory" or derivative infringers. Pet. App. A 26-27. VCR owner-users, if not indispensable parties to this action under Rule 19(a)(2)(i), F.R.Civ.P., were entitled to intervene as of right, Rule 24(a)(2), F.R.Civ.P.

News and Public Affairs Programming. Besides regular news broadcasts, TV public affairs programming includes interview programs, panel discussions on current events and special documentaries. During the sample week broadcasters offered 51 public affairs broadcasts, including highly respected journalistic series like "The MacNeil/Lehrer Report","This Week With David Brinkley" and "60 Minutes." Special broadcasts ranged in topics from crime to American assessments of Soviet military strength.

Important news events (e.g. Presidential speeches and press conferences) often are broadcast during working hours, as is live coverage of daytime local and national legislative proceedings. VCR's permit working consumers to record and view such programming, enhancing voter knowledge and understanding of public affairs. *See Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968) ("public interest in having the full information available on the murder of President Kennedy" outweighs copyright protection). *See also C.B.S., Inc. v. Democratic National Committee; Meeropol v. Nizer*, 361 F.Supp. 1063, 1068 (S.D.N.Y. 1973).

Scientific Programming. TV is particularly well suited to the presentation of scientific concepts to the layman. The sample week presented six special broadcasts on scientific and environmental topics, including two National Geographic programs, a commemoration of the centennial of Einstein's birth, four programs on health and episodes of the acclaimed series "Nova" and "Life on Earth." VCR's not only enable more of the public to view such programs but make it easier for parents to share them with their children.

Children's Programming. Home recording capability gives parents more control over what their children see. Currently only 20% of children's viewing time is spent watching children's programming. VCR's enable parents to direct their child's viewing towards educational broadcasts aimed specifically at children, like "Sesame Street."

Often programs marvelously suitable for children are broadcast in prime time viewing hours.[6] If they conflict with a program adults prefer or are broadcast after a child's bedtime, a VCR can preserve the program for the child's viewing the next afternoon.

Home recording also offers children themselves more control over what they see, with educational benefit. Dr. John C. Wright of the Center for the Influence of Television on Children has noted that with VCR's "children will be able to stop the program at any time to reflect on what they've seen or look up additional information, or replay a part they didn't understand. . . . This will offer incredible learning opportunities to those kids who don't respond to print media but learn well from images." *New York Times,* March 12, 1981, § 3, at 6, Col. 2.

Religious and Instructional Programming. The sample week included 22 religious programs. The VCR promotes the producer's goal to communicate his message widely. The sample week included broadcasts teaching woodworking, oil painting, home repair, cooking, small business management and exercise. About 500 colleges nationwide broadcast courses for credit.

Artistic, Literary and Historical Programming. Adaptations of literary works, historical dramatizations and programs about creative artists inform and increase exposure to cultural and historical subjects. The week included Evelyn Waugh's *Brideshead Revisited,* Brontë's *Jane Eyre,* a dramatization of the life of Admiral Horatio Lord Nelson, telecasts from the Kennedy Center, the Oakland Symphony Orchestra and the "American Playhouse" series. Broadcasts on artistic or literary subjects included the work of Norman Rockwell and Carl Sandburg, profiles of playwright Lillian Hellman and tenor Luciano Pavarotti and a series on the nature of creativity.

2. Non-copyrighted and Permitted Uses of Broadcasts

The Ninth Circuit assumed that all TV programming was copyrighted; but at least three categories of TV programming are not protected by copyright at all. *See* Pet. at 4-5.

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[6] For example, the commercial network program "The Lion, the Witch and the Wardrobe" from C.S. Lewis' *Chronicles of Narnia* was broadcast between 8 and 9 p.m. EST.

3. Non-broadcast Uses

The Ninth Circuit held that

> [v]ideotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Therefore, videotape recorders are not "suitable for substantial noninfringing use."

Pet. App. A 25-26. It ignored other uses of VCR's that do not involve recording of broadcasts off-the-air.

Respondents urged below that these uses could be accommodated by limiting the sale of VCR's to those suitable only for such uses, those manufactured without tuners.[7] We do not know whether respondents would propose that their injunction against use of the 3.5 million conventional VCR's already sold would exclude non-broadcast uses; but such an injunction would make the "video policeman's" enforcement job more difficult and more intrusive still, peeking over transoms to spy out whether the tuner was in use.

In any case the suggestion misses the point. The many and varied non-broadcast uses of conventional VCR's – which the Ninth Circuit ignored – add to the reasons why VCR's are "staple items of commerce" not subject to condemnation as engines of infringement, *see* Pet. at 23-24 and cases cited at *id.* nn. 22-24. These uses and their potential increasing popularity among conventional VCR owners add to the reasons why this Court should free VCR owners and their machines of the stigma cast by the Ninth Circuit and the burdens that may be imposed on them by its ruling.

Production of Personal Videotapes. Many VCR owners and users use their equipment to produce, film and view their own videotapes of family events.[8] Students may film legal arguments, speeches, debates, theatrical roles and the like, enabling them to critique and to improve their performance. Sales of portable VCR units doubled from 1980-81 and are steadily increasing. It is estimated that 80% of portable VCR purchasers will buy videocameras. 21 *Television Digest* 50 (December 14, 1981).

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[7] The electronic components permitting receipt of broadcast signals.

[8] *See* Time, *Home Video Market; Blank and Prerecorded Software Interests,* 38 (June 1979). *See also* Media Statistics, *The Video Cassette Recorder, Spring 1980,* 3, 10 (July 1980).

Viewing of Prerecorded Videotapes. Sale and rental of prerecorded video cassettes and tapes is increasing, *see* Pet. App. B 112. One of respondent Universal's competitors, Twentieth Century Fox, has already released fifty motion picture cassettes or tapes for use with VCR's in the home. *Id.* Between 40% and 50% of VCR owners have purchased or rented prerecorded video programs.[9] *See* Corporation for Public Broadcasting, *Home VCR Owners' Use of Television and Public Television: Viewing, Recording & Playback* at 17 (March 15, 1980); Media Statistics, *The Video Cassette Recorder, Spring 1980* at 10 (July 28, 1980); Time, *The Home Video Market; Blank and Prerecorded Software Interests,* 27 (June 1979). Prerecorded instructional cassettes are available on varying subjects, e.g., first aid, child, pet and plant care, home and automobile repair, cooking, exercise, dance, speed-reading and tennis. Cassettes of historical interest like out-dated newsreels and current news documentaries now are available because of VCR's.

Professional Uses. Many professions use VCR's. Educators videotape courses for students to earn college credit at home.[10] Training programs in government and industry rely on VCR equipment. Instructors and coaches of golf, tennis, skiing, swimming and other sports tape their students' performance to assist them in improving technique. Lawyers videotape depositions,[11] trial practice instructors record student performances for purposes of critique and lectures at bar conferences and continuing legal education courses are recorded and widely disseminated.

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[9] *See also* Time, *Home Video Market; Blank and Prerecorded Software Interests,* 27-33 (June 1979).

[10] *See* Note, *Home Videorecording: Fair Use or Infringement?,* 52 So. Cal. L. Rev. 573, 585 (1979), citing Conference on Video Recording for Educational Uses, Final Report, Working Group 2, at 1 (July 21, 1977).

[11] Two Presidents have given testimony by videotape: Jimmy Carter to a Grand Jury investigating swindler Robert Vesco and Gerald Ford to the court at the trial of "Squeaky" Fromm for her assassination attempt.

Flamboyant lecturers like Irving Younger tape and distribute lectures throughout the country, giving thousands of students studying for their bar examinations brief respite from the drudgery of their everyday instruction.[12]

In medicine, videotapes of surgery are preserved for research and treatment purposes (and in anticipation of malpractice litigation). The American Medical Association's Continuing Medical Education Program distributes videotape courses on medical advances to physicians who do not have access to teaching institutions. Medical students receive videotape instruction in such disciplines as radiology, orthopedics, pediatrics and advanced neuroanatomy. At the Georgetown University Medical Center, for example, it is estimated that the average medical student will view videotapes eight times a year.[13] One hospital has developed a program for recording group therapy sessions with adolescent cancer victims. Tapes are later used in the analysis of individual group members, and may be distributed for the benefit of subsequent cancer victims.

* * *

In testimony before the Senate, the Deputy Director of the National Citizens Committee for Broadcasting summarized:

> VCRs are useful tools with many functions: with a hand-held camera, a mother can capture her daughter's first steps on video; after a trip to the public library or the video rental store, a family can watch a recent feature film or a Bogart classic in the comfort of their living room; a laborer can set the timer on his VCR before leaving for work on second shift, return home after midnight, and watch several hours' worth of prime-time television at his own prime time. Consumers deserve protection in all these endeavors. Many of the uses of VCRs raise no copyright questions whatsoever. And many uses of copyrighted materials raise

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[12] Appendix C reproduces a current brochure of the Bureau of National Affairs, Inc., advertising continuing legal education courses on videotape.

[13] Conversation with Ass't Librarian for Public Information Services of Georgetown Medical School.

> no question as to their "fairness." In the long run, no good whatsoever can come from banning the use of VCRs, as some would suggest.

Testimony of Joseph Waz, Hearings on S. 1758 before the Senate Judiciary Committee, 97th Cong., 1st Sess. 2-3 (November 30, 1981).

II. The Ninth Circuit's Decision Would Create An Unconstitutional Encroachment On The Legislative Branch

A. Congress Has Entered The Arena

The decision below holds VCR owners and users hostage to the covetousness of one motion picture producer[14] for a windfall share in the profits of a new technology, earned by the invention and investment of others. It is a windfall because the respondents long ago bargained away the TV rights to all the specific productions at issue.[15]

Not even the Ninth Circuit has seriously disputed that the issue of whether respondents should share in the profits is preeminently meet for legislative resolution. *See* Pet. App. A 18; note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use Looks Different on Videotape," 66* VA. L. REV. 1005, 1024-27 (1980). Indeed, the legislative process is well under way, *e.g.* H.R. 4783 (October 20, 1981), H.R. 4794 (October 20, 1981), H.R. 4808 (October 21, 1981), S. 1758 (October 21, 1981), Amendment No. 1242 to S. 1758 (December 16, 1981), Amendment No. 1242 to S. 1758 (December 16, 1981) (97th Cong., 1st Sess.). Senate[16] and House[17] hearings have been held.

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[14] While there are two respondents here, Disney and Universal, Disney did not join as a plaintiff in the RCA case.

[15] Whether VCR technology will in the long run affect respondents' profits could not be established in the lower court. Pet. App. B 50, 108-15. *See, e.g.*, Comment, *All's Fair In Love And Private Videorecording,* 30 CATH. U. L. REV. 621, 628-32 (1981); Note, *Home Videorecording: Fair Use or Infringement?,* 52 SO. CAL. L. REV. 573, 574-86 (1979). VCR's presumably increase the number of viewers who watch a broadcast, thus increasing its value to advertisers and enabling producers like respondents to bargain for a higher royalty from the networks.

[16] Hearings before the Senate Judiciary Committee on S. 1758, November 30, 1981, April 21, 1982.

Some of the bills simply reverse the Ninth Circuit's decision. One, Amendment No. 1242 ("the Mathias Amendment"), would establish a compulsory license for VCR's and blank tapes and refer to the Copyright Royalty Tribunal established by 17 U.S.C. § 801 the task of determining the amount, method of collection and distribution of royalties for the compulsory license – precisely the task that the Ninth Circuit would have the district court perform. Pet. App. A 28-29.

B. The Most Likely Relief To Be Sought Below, a Judicial Royalty System, Is Unconstitutional

Respondents were unable to show any actual loss of profits; an accounting therefore would avail them little. This is not a pirating case, where seizure is an effective remedy for copyright holders, *see Duchess Music Corp. v. Stem,* 458 F.2d 1305 (9th Cir.), *cert. denied,* 409 U.S. 847 (1972). Injunction against sale of VCR's and tapes would destroy an industry and deprive Americans of an important technology but would not put another dollar into respondents' pockets nor foster additional "sales" of an authentic instead of a copied item, *see Dollcraft Industries, Ltd. v. Wellmade Toy Mfg. Co.,* 479 F.Supp. 1105 (E.D.N.Y. 1978). Only the Ninth Circuit's unprecedented compulsory licensing scheme is likely to provide respondents with any economic benefit, a share in VCR and tape manufacturers' and sellers' earnings.

Whether or not such an economic transfer is fair in the abstract, it is not the kind of decision the courts can effectively make or once made administer, and this is an area that the Constitution forbids the courts to meddle in. The Ninth Circuit's judicially created, administered and enforced royalty scheme would usurp the functions of Congress and the Executive branch. Of course no court has ever gone so far in donning both legislative and executive hats in a scheme for continuous regulation and adjustment of competing economic interests. But cases where this Court has struck down lesser judicial intrusions into other branches' realms demonstrate the Constitutional whimsy of the Ninth Circuit's notion. For example:

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[17] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee on H.R. 4808 and H.R. 5705, April 12-14, 1982 (in Los Angeles).

In *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442, 444 (1923), the Court declined Congress' invitation "to revise the legislative discretion of the [D.C. Public Utilities] commission . . . and enter the order it deems the commission ought to have made," holding that "[s]uch legislative or administrative jurisdiction . . . cannot be conferred" upon the judicial branch. Article III does not extend to such "administrative or legislative issues or controversies." The Court followed *Keller* in *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930), refusing, on Article III grounds, to exercise power Congress sought to confer on the courts to decide whether renewal of a broadcast license would serve the "public convenience, interest and necessity." *Id.* 466. The Court held that the function was "purely administrative," *id.* 467, that the case was an "administrative proceeding" and that it was improperly called upon to "exercise or participate in the exercise of functions which are essentially legislative or administrative," *id.* 469. In *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), the D.C. Circuit set licensing conditions and ordered the Federal Power Commission to carry them out. This Court chastised the court of appeals for "usurp[ing] an administrative function" and rendering "an administrative, not a judicial decision." *Id.* 20, 21.[18]

Questions of patent and copyright policy are expressly confided to the Congress. U.S. Constitution, Article I, § 8. In particular, as this Court has held, such monopoly rights should not be expanded absent the clearest Congressional intent, *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531, 532 (1972), especially where new industries are concerned. *Parker v. Flook*, 437 U.S. 584 (1978). Here a new communications technology has created potential "shifts in current business and consumer relationships . . . Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 414 (1974).[19] Any regulation of the use and economic rewards of VCR technology will affect the future of numerous industries[20] and millions of consumers. Resolving the whethers and hows of compensation to copyright holders "entail[s] extensive factfinding and a legislative, rather than a judicial, judgment." *Teleprompter,* 415 U.S. at 413 n. 15. Politics, economics, and the details of technology and science all bear on the proper resolution of the many questions involved; which, as the Court noted in another context, "are delicate, complex, . . . involve large elements of prophecy" and require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility," long held "to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). *See also Baker v. Carr,* 369 U.S. 186, 210 (1962); *Coleman v. Miller,* 307 U.S. 433, 454 (1939); *The Cherokee Nation v. Georgia,* 5 Pet. 1, 20 (1831).

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[18] The principles of these cases still stand. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 580 (1962); FPC v. Transcontinental Gas Pipe Line, 423 U.S. 326, 331-34 (1976).

C. The Courts' and Congress' Treatment of Cable TV Illuminate the Ninth Circuit's Error

Fourteen years ago, in the seminal case that helped prompt the 1976 amendments to the Copyright Act,[21] the Court declared that it is not the courts' task "to accommodate various competing considerations of copyright [and] communications . . . policy . . . . That job is for Congress." *Fortnightly Corp. v. United Artists*

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[19] *See also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) ("The choice . . . is a matter for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot"); Gottshalk v. Benson, 409 U.S. 63, 73 (1972) ("If these programs are to be patentable, considerable problems are raised which only committees of Congress can manage . . . ."). *See also Parker v. Flook,* 437 U.S. at 596.

[20] *E.g.*, the television networks, television broadcast producers, the motion picture industry, VCR manufacturers, manufacturers of VCR accessories such as tapes, VCR distributors and retail and wholesale appliance outlets.

[21] *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. at 414 n. 16.

Television, Inc., 392 U.S. 390, 401 (1968). VCR time-shifting, like the cable TV technology this Court wrestled with in *Fortnightly* and *Teleprompter,* "no more than enhances the viewer's capacity to receive the broadcaster's signals". *Fortnightly*, 392 U.S. at 399 (footnotes omitted). As with cable, "the basic function [VCR] equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Id.*

The interplay of the Court, the Congress and the Commission in the cable TV controversy is a model for the proper disposition of the VCR controversy. The Court held in *Fortnightly* and *Teleprompter* that the difficult questions at issue were for Congress, not the courts to resolve and reversed lower court rulings finding copyright infringement. Congress then acted, established a comprehensive scheme and delegated its detailed regulation to the Federal Communications Commission, 17 U.S.C. § 111. The Commission decided to allow cable transmission of TV broadcasts of syndicated programs (*e.g.*, reruns like "I Love Lucy") because "consumers would be decidedly better off" with "increased viewing options from the greater availability of expanded cable services," and the court affirmed. *Malrite T.V. of New York v. F.C.C.*, 652 F.2d 1140, 1145-46 (2d Cir. 1981). Here the Ninth Circuit proposes to have the district court perform the legislative and regulatory roles, embroiling it in a task for which a court is wholly unfitted.

D. The District Court Lacks The Capacity To Administer the Ninth Circuit's Royalty System

The Ninth Circuit's royalty system would plunge the district court into a routine of daily intervention into the lives of VCR owners and users and the everyday business decisions of VCR equipment manufacturers, television broadcasters, and the networks. It would open a Pandora's box of judicial regulation, but without the information, resources and investigative tools for weighing developments in new technology that the legislature commands.

The amounts to be collected and distributed are wholly speculative. The district court has found it impossible to predict the harm to producers from continued, untrammeled VCR use.[22] Pet. App. B 50, 107-15. VCR's may even increase their profits. *Id.* 112, 113; *see Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. at 412-13; Marsh, *Betamax and Fair Use: A Shotgun Marriage,* 21 Santa Clara L. Rev. 49, 76 (1981); Comment, 30 Cath. U. L. Rev. at 627-32, 651; Note, *Home Videorecording: Fair Use or Infringement?,* 52 So. Cal. L. Rev. 573, 617 (1979). The court lacks the legislature's ability to marshal expertise in communications, engineering, computer technology, marketing, economics and other disciplines, necessary to make judgments and predictions of harm and especially to evaluate them in money terms. A court is even less capable of determining how and to whom to distribute collected royalties, still less to administer collection and distribution of the money.

The Ninth Circuit would have the district court become — or create and supervise — a self-defining bureaucracy, acting without legislative standards as it is faced with new products, new communications technology,[23] new methods of broadcast marketing and the like, and without any source of appropriated funds to defray the probable great expense of this endeavor.

The U.S. Register of Copyrights has put the matter sharply:

> When law and broad policy are created judicially, policy often emerges piecemeal by small accretions of

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[22] One comment puts it:

> The actual harm to plaintiffs is difficult, if not impossible, to ascertain. Although the ratings services may be able to measure the amount of home videorecording, the court would have to fashion any restitutional remedy to apportion the damages among the various producers in relation to the harm sustained. That any such system would have to take into account the number of times viewers watched a particular show compounds the problems.

Note, Universal City Studios, Inc. v. Sony Corp.: "Fair Use Looks Different on Videotape," 66 U. Va. L. Rev. 1005, 1024 (1980).

[23] *E.g.*, the backyard satellite dish antenna which can pick up broadcasts from anywhere in the world. How would the district court deal with claims for a royalty share filed by the BBC or Polish National TV?

> precedent. Or, in an effort to achieve legislation-like results, courts issue broad declarations that rest only on the particular facts of the given case. These shortcomings need to be carefully considered because the courts are moving to apply the test of fair use to private taping and other copyright problems created by new technologies. The result may be the emergence of broad policies without any clear legislative guidance.

Ladd, *Home Recording and Reproduction of Protected Works,* 68 A.B.A.J. 41, 43 (1982).

CONCLUSION

Having disposed of the rights of millions of American consumers without their participation, convinced of the frivolous nature of VCR use, bemused by a theoretical judicial construct of a "compulsory license" that would be an administrative nightmare and treading a field reserved to the Congress, the Ninth Circuit issued a decision that is a Frankenstein's monster. This Court should grant certiorari and reverse.

Respectfully submitted,

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	Names of Law Firms	Names of Organizations
1.	Squire, Sanders & Dempsey	Consumer Electronics Group of Electronic Industries Association
2.	Amster, Rothstein & Engelberg	General Electric Company Matsushita Electric Corporation of America Matsushita Electric Industrial Co., Ltd. N.A.P. Consumer Electronics Corp. Panasonic Hawaii, Inc. RCA Corporation US JVC Corp. Victor Company of Japan, Ltd.
3.	Kindel & Anderson	Hitachi, Ltd. Hitachi Sales Corporation of America
4.	Miller, Schreiber & Sloan	CES Publishing Corp.
5.	Steven C. Kany, Corporate Counsel	Pfizer Inc.
6.	Lillick, McHose & Charles	Sanyo Electric, Inc.
7.	Abrams, Kovacs, Westermeier & Goldberg, P.C.	National Association of Retail Dealers of America
8.	Hughes, Hubbard & Reed	McCann-Erickson, Inc. Batten, Barton, Durstine & Osborn, Inc. Backer & Spielvogel, Inc. Waring & Larosa, Inc. Ammirati & Puris Inc.
9.	Sidley & Austin	American Library Association
10.	Dobrovir, Oakes & Gebhardt	Virginia Citizens' Consumer Council, Inc. Arizona Consumer Council Idaho Consumer Affairs, Inc. Association of Massachusetts Consumers, Inc. North Carolina Public Interest Research Group Minnesota Public Interest Research Group

		Oakland Alameda County Consumer Council Rhode Island Consumer Council The Center for Consumer Affairs The United States Consumer Association Edward Greensfelder, Jr. William C. McLaughlin Robert McEwen Judy Braiman-Lipson
11.	Tung, Drabkin & Boynton	TDK Electronics Co., Ltd.
12.	John Ashcroft, Attorney General and Attorneys General for:	State of Missouri State of Alaska State of Illinois State of Iowa State of Minnesota State of Mississippi State of Montana State of North Carolina State of Ohio State of Oklahoma State of Vermont State of Wisconsin
13.	Sidley & Austin	Minnesota Mining & Manufacturing Company Fuji Photo Film Co., Ltd. Maxell America, Inc.
14.	Latham & Watkins Latham, Watkins & Hills	Sears, Roebuck and Co.
15.	Berger, Steingut, Weiner, Fox & Stern	National Retail Merchants Association
16.	Mudge, Rose, Guthrie & Alexander	Toshiba Corporation Toshiba America, Inc.
17.	Augustus Steinhelber	Ad Hoc Committee on Copyright Law

No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,
v.
UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
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SONY CORPORATION OF AMERICA, *et al.*,
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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

THE CONSUMER ELECTRONICS GROUP REPRESENTS SUBSTANTIALLY ALL OF THE COMPANIES OFFERING VIDEO TAPE RECORDERS FOR SALE IN THE UNITED STATES

This brief is submitted by the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG") with the written consent of all parties on file with the Clerk of this Court. EIA/CEG is a 56-year-old trade association with headquarters in Washington, D.C. Its members include almost all of the domestic manufacturers of television receivers and nearly all foreign-owned or affiliated manufacturers having facilities in the

United States. Almost all companies that sell video tape recorders ("VTRs") at the manufacturer's level in the United States are members of EIA/CEG.[1]

This *amicus curiae* brief is submitted pursuant to authorization by the Board of Directors of EIA/CEG. The vital interests of the television receiver and VTR industry are at stake in these proceedings, and as a representative of nearly all VTR manufacturers and sellers of the product at the manufacturer's level in this country, EIA/CEG has a crucial interest in supporting the Petition for *Writ of Certiorari* filed by Sony Corporation of America, *et al.*

II

THE VIDEO TAPE RECORDER HAS MANY USES

The VTR is a multipurpose consumer electronic device which has revolutionized the concept of home entertainment. The VTR can be used for many purposes including time shifting, playing of prerecorded programming, and recording of and watching home movies.

A. Time Shifting

"Time shifting" reflects the advantage offered to the consumer from the VTR's ability to shift in time a television program. By time shifting, a VTR owner who is not at home can record programs for later viewing. A VTR user can also time shift by recording one program while watching another.

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[1] They are as follows: General Electric Company; Matsushita Electric Corporation of America (Panasonic and Quasar); N.A.P. Consumer Electronics Corporation (Magnavox, Philco and Sylvania); RCA Corporation, Consumer Electronics Division; Sansui Electronics Corporation; Sanyo Manufacturing Corporation, Sony Corporation of America; Toshiba America, Inc.; U.S. JVC Corporation; Zenith Radio Corporation. Though not members of EIA/CEG, Hitachi Sales Corporation and Sharp Electronics Corporation have each given their full support to the position taken here by EIA/CEG.

Without question, the primary use of the VTR is time shifting. Petitioner Sony's survey found that 96 percent of VTR owners use their VTR primarily to view television programs that they could not otherwise have watched (Pet. App. at 48).[2] Even respondent MCA's survey found that 75.4 percent of all VTR owners use their machine to record for time shifting half or most of the time (Pet. App. at 47-48).

B. Home Movies

Another, increasingly popular, use of the VTR is to make original movies.[3] By using a video camera, a VTR owner can inexpensively record on blank video tape. Indeed, it is over 50 times more costly to record home movies using eight millimeter film than it is to record the same amount of time on video tape.[4] Home movies recorded on video tape can also be played back immediately through a VTR and shown on a television screen, whereas traditional home movies require the time to develop the movie and the inconvenience of setting up a projector and screen.[5]

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[2] References to "Pet. App." are to the Appendix of Petitioner Sony Corporation of America filed with its Petition for Writ of Certiorari.

[3] *See, e.g.*, Hughey, *Sales of Home-Movie Equipment Falling as Firms Abandon Market, Video Grows*, Wall St. J., March 17, 1982, at 29 col. 4.

[4] "A reusable videotape lasting two hours or more costs between $12 and $18, compared with about $10, including developing, for a 3½ minute role of eight millimeter movie film." *Id.*

[5] *Id.* Given the advantages of home video movies, it is unsurprising that January and February 1982 sales of color video cameras jumped more than 78 percent over January and February 1981 sales. Consumer Electronics Daily, March 15, 1982, p. 2.

C. Prerecorded Tapes

VTRs are also used extensively to play prerecorded programming.[6] Over 35,000 prerecorded video programs are currently available.[7] By allowing VTR users to watch prerecorded programming in the privacy of their homes, the VTR has expanded consumer home viewing alternatives and created a large market for entertainment programming. It has also created an enormous market for producers and users of educational, instructional and business oriented programming.

D. Other Uses

The VTR is expected to become an essential component of at least one American manufacturer's projection television system.[8] In the future, the VTR is also likely to serve an essential role in the new electronics media by storing and displaying teletext, videotext, home computer graphics and electronic photography.[9]

These uses of the VTR, which do not even arguably infringe on anyone's copyright, underscore the tremendous home entertainment breakthrough the VTR has bestowed upon consumers.

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[6] *See, e.g.*, Variety, Mar. 10, 1982, pp. 35-36.

[7] National Video Clearinghouse, Inc., *The Video Source Book* (3d ed. 1981).

[8] Bulkeley, *Inventor Kloss Trying for the Fourth Time to Turn His Ideas Into a Healthy Business*, Wall St. J., March 16, 1982, at 31 col. 4.

[9] Teletext is a new television broadcast service which will require a special decoder for reception, videotext is an analogous service that transmits data over telephone lines for display on television receivers, and electronic photography stores an "image" without the use of film or videotape which can be stored and displayed using a VTR. The first two services are in commercial use abroad and will soon be in commercial use here. Electronic photography/VTR usage is at the prototype stage.

III

THE COURT OF APPEALS' DECISION FINDING THE SALE AND HOME USE OF VTRS ILLEGAL HAS A FAR REACHING EFFECT ON INDUSTRY

The Court of Appeals' decision holding VTR use by consumers to be copyright infringement and Petitioners liable for contributory infringement is of critical importance to the consumer electronics industry in general, and to the home video recording industry in particular.

Over three million VTRs have been sold in the United States[10] at a range in retail price between $500 and $1,600.[11] Thus, over ten million Americans now use a VTR in their homes and have invested well over two billion dollars in VTRs, and at least half as much in related products such as video tapes and video cameras.[12]

The VTR's popularity has also had a positive economic effect on many sectors of the economy. Millions of dollars have been spent on advertising VTRs and prerecorded tapes.[13] Thousands of video specialty stores have opened to serve the VTR user.[14] In addition, the VTR has opened a large and lucrative multimillion dollar market for prerecorded programming producers, such as respondent MCA, Inc.[15]

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[10] THE HOME VIDEO & CABLE REPORT, March 8, 1982, at 3.

[11] Federal Communications Commission—Network Inquiry Special Staff, Appendix by D. Agostino "Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette and Videodisc Players" (1980) p. 34.

[12] *Id.* at 35.

[13] Nine major sellers of VTRs spent more than $44,000,000 on VTR advertising during a five year period prior to June 1980. ADVERTISING AGE, June 2, 1980, at 67.

[14] It is estimated that 2,000 to 3,000 video specialty stores opened in 1980 alone. THE HOME VIDEO REPORT, March 30, 1981 at 1.

[15] The International Tape/Disc Association bestows a "Golden Videocassette Award" to each prerecorded movie which has achieved

Sales of VTRs continue to increase. In 1981, VTR sales jumped more than 61 percent over those in 1980.[16] Absent adverse judicial or legislative intervention, it is expected there will be about 20 million VTR homes by 1986.[17]

The Court of Appeals suggests that the District Court, in fashioning a remedy, should consider whether to enjoin the sale of VTRs, levy a continuing royalty, or impose statutory damages (Pet. App. at 28-29). These penalties would be crippling, if not fatal, to the growing VTR industry. Worse, the Court of Appeals has directed the District Court to impose this punishment with little consideration to the viability of a billion dollar industry which employs tens of thousands of Americans and without regard to the millions of consumers who own or plan to buy a VTR.[18]

IV

THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER A SO-CALLED INTRINSIC USE PRECLUDES A FINDING OF FAIR USE

A. The Traditional Fair Use Doctrine

The fair use doctrine is entirely equitable. *Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*, 621 F.2d 57, 62 (2d Cir. 1980). As this Court has explained, the copyright laws reflect a "balance of competing claims upon the public interest: Creative work is to be . . . rewarded, but . . . must ulti-

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$1 million in video cassette sales. As of this writing, 109 Golden Videocassette Awards have been granted. MCA Videocassette Inc. has received 21 of these.

[16] The Video Retailer, March/April 1982.

[17] Variety, Jan. 6, 1982 at 1.

[18] The Court of Appeals all but conceded that its decision will have a disastrous effect on the industry with its assertion that "the continued profitability of appellees' businesses is of secondary concern" (Pet. App. at 29).

mately serve the cause of promoting broad public availability . . . ." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). "Since the issue of fair use is one of fact . . . the ["]clearly erroneous["] standard of review is appropriate." *MCA, Inc. v. Earl Wilson*, 1981 COPYRIGHT LAW DECISIONS ¶ 25,287 at 16,582 (2d Cir. 1981). Here, the Court of Appeals did not declare any of the trial court's findings to be clearly erroneous.

B. The Court of Appeals' Intrinsic Use Rule

The Court of Appeals, however, in a major departure from existing law, has declared that no balancing test should be employed with regard to VTRs. It ruled that a so-called "intrinsic use" cannot be a fair use regardless of the balance of the equities (Pet. App. at 18). The Court of Appeals defined an intrinsic use as a use of the copy for the same purpose that the original served. In reaching this ruling, the Court of Appeals acted in express conflict with the decision of the Court of Claims[19] and the factual findings of the trial court and in derogation of the principles underlying the fair use doctrine enunciated by Congress and the Judiciary. The result, when combined with the Court of Appeals' novel and draconian expansion of the contributory infringement doctrine, is a major assault on copyright law under the new Act, and a direct threat of extinction for the VTR industry and inevitable disruption of other industries which also make possible intrinsic uses, *e.g.*, photocopiers and audio tape recorders.

While apparently recognizing that the fair use doctrine requires "balancing the equities" the Court of Appeals refused to employ the normal balancing test because it felt that such balancing was "hostile . . . to the rights of copyright holders" (Pet. App. at 18). The Court of Appeals felt that "[n]ew technology . . . places a strain upon the fair use doctrine" and implied (with apparent disfavor) that new technology would generally be classified as a fair use if the balancing test were used. *Id.*

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[19] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

The fear that the copyright holder will "lose" is not a principled reason for not employing the balancing test that has always been the heart of the fair use doctrine. Moreover, substituting a mechanistic rule that an intrinsic use "precludes" a finding of fair use with regard to new technology (Pet. App. at 18) is contrary to the express will of Congress. As the House Report accompanying the 1976 Copyright Act explained:

> *General intention behind the provision*
>
> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5680.

Congress did not share the Court of Appeals' hostility to new technology. It directed a flexible, case-by-case balancing process such as the trial court employed in finding fair use. Congress deliberately eschewed inflexible rules-of-thumb of the kind relied upon by the Court of Appeals.

The Court of Appeals also failed to explain *why* an intrinsic use should preclude fair use. An intrinsic use, in certain circumstances, may yield smaller benefits than other uses, but the normal balancing test would take account of such a reduction in benefits. It cannot be gainsaid that new technology employing intrinsic uses, *e.g.* VTRs and photocopiers, are perceived by consumers as being tremendously beneficial. Indeed, it is precisely because the Court of Appeals feared that VTRs would be found so beneficial that it refused to "balance the equities" (Pet. App. at 18).

The Court of Appeals attempted to picture its actions as the product of judicial restraint and deference to Congress, but its actions belie its characterization. The Court of Appeals refused to employ the case-by-case balancing process mandated by Congress with regard to new technology and fair use because the Court of Appeals made a policy judgment that such a process would prove too "hostile" to copyright owners. This is a classic example of a court substituting its policy judgment for that of Congress.

The Court of Appeals acknowledged that its intrinsic use rule was contrary to *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). The Court of Appeals attempted to savage that decision by stating that it "has been appropriately regarded as the 'Dred Scott decision of copyright law' " (Pet. App. at 15, quoting Nichols, J. in dissent, 487 F.2d at 1387). This *ad hominem* attack ignores the fact that Congress essentially adopted the *Williams & Wilkins Co.* decision in Section 108 of the Copyright Act of 1976 (the "Act"), 17 U.S.C. § 108, and took the four illustrative fair use factors listed in Section 107 of the Act from the decision. Moreover, the implication that four judges of this Court voted to affirm a "Dred Scott" decision demonstrates the rhetorical excesses that have been substituted for legal reasoning. There is an urgent need for decision by this Court to resolve this serious conflict in the interpretation of fair use.

V

THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE COPYRIGHT HOLDER IS ENTITLED TO AN IRREBUTTABLE PRESUMPTION OF INJURY

VTRs are unprecedented. Their primary uses, time shifting and display of prerecorded video tapes, *benefit* copyright holders.

The goal of a television broadcaster is to induce as many people as possible to watch its programs. Some potential viewers, however, cannot be home or are doing something else when a program they would like to watch is broadcast. By using a VTR to "time shift," which the trial court found to be the primary use of VTRs, those potential viewers are able to become actual viewers and the goal of the broadcaster[20] is enhanced by the VTR. The trial court found that VTRs had this potential to benefit copyright holders by expanding viewing of their programs (Pet. App. at 110, 112).

The Court of Appeals did not declare that finding, or the trial court's finding that the plaintiffs below were not injured by VTR usage, to be clearly erroneous. The Court of Appeals, however, concluded on the basis of *a*

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[20] Maximum viewership is also the goal of advertisers and producers who sell copyright interests to broadcasters. Projected audience size determines advertising rates and sales prices for copyrighted productions. Thus, VTR time shifting usage indirectly provides greater economic incentives to authors. *See* Pet. App. at 51.

priori reasoning that there *must* be injury. Its logic was two-fold. First, the Court of Appeals declared that:

> It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market (Pet. App. at 24).

With respect, this is a *non sequitur*. The copyright holder does not control access to televised programming in the sense envisioned by this quotation. Once broadcast, anyone can view a normal television signal—no license is required, only a television receiver. The commercial networks spend millions of dollars trying to maximize viewership. Viewers "assign economic value" to a television receiver because it gives them "access to copyrighted works," but they pay no fee to copyright holders when they purchase the receiver. As noted above, copyright holders "exploit this market" through payments they receive based on projected viewers of their program and the resultant advertising rates. Thus, copyright holders already "exploit" the VTR market and they do so in the identical manner in which they exploit the general television market.[21]

The Court of Appeals' second resort to *a priori* reasoning was the following:

> The court, in analyzing the fourth fair use factor, did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders. It seems clear that absent an inquiry which takes into consideration the full scope of the "infringing" practice, copyright plaintiffs, in cases of this sort, would face insupera-

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[21] Note that in both cases there is no control over whether the viewers will actually watch the advertising that is the economic base for commercial broadcasting.

> ble obstacles to the protection of their rights. And, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the *potential* market for appellants' works (Pet. App. at 24-25) (emphasis in original).

Again, things were "clear"[22] to the Court of Appeals without any citation to the trial record, indeed, directly contrary to the trial court's findings of no injury and potential financial benefit from VTR usage.

Even a brief examination reveals that there is no *a priori* means of finding that the *cumulative* effect must tend to diminish the copyright holder's *potential* market. The alleged infringement in time shifting is recording a program, that the viewer ordinarily would have missed, for viewing at a later time. *A priori* reasoning suggests that this "infringement" increases viewership of the "infringed" program. A study commissioned by the Federal Communications Commission confirms this reasoning.

> Because both major rating services—A. C. Nielsen and Arbitron—now include an indication of VCR use, this time-shift phenomenon should actually be an asset to the networks and broadcasters. Shows which would have been missed can now be recorded for later viewing. Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports.[23]

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[22] The Court of Appeals used the same phrase "it seems clear" or a variant thereof four times in a single page of the official reporter (659 F.2d at 974) in its discussion of injury. No citation to the trial record was made in that entire discussion. *See* Pet. App. at 22-25.

[23] Federal Communications Commission—Network Inquiry Special Staff, Appendix by D. Agostino "Home Video: A Report on the

The *cumulative* effect as VTR ownership expands is to increase significantly the copyright holder's market. Indeed, the "genius of Betamax" is that it converts a *potential* market for the "infringed" program into *actual* viewers by allowing time shifting. Similarly, the growing use of VTRs to display prerecorded videotapes has *created* an entirely new market for copyright holders that brings them many hundreds of millions of dollars.[24] Other VTR uses, *e.g.*, home movies, teletext, electronic photography, present no copyright dangers and may also create new markets for copyright holders.

Even so-called "librarying" was found by the trial court not to injure copyright holders (Pet. App. at 112-13).[25] In sum, *a priori* reasoning suggests that VTR use *benefits* copyright holders and converts potential markets into actual viewers. Moreover, the *cumulative* effect as VTR usage grows will be to increase these benefits. Most importantly, however, the evidence at trial and the trial court's findings support this same conclusion. The Court of Appeals has created an irrebuttable presumption of injury which is contrary both to fact and logic.

Once more the Court of Appeals said that it need not reach the issue of injury given the intrinsic use of VTRs. The Court of Appeals did not explain why this was the case. The entire equitable, balancing test nature of the fair use doctrine is perverted by the holding that a use which benefited the copyright holder can not be a fair use.

Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players" p. 61 (1980).

[24] Approximately six million prerecorded video cassettes were sold in the United States in 1981 at an estimated *wholesale* value of over $400 million. *See, e.g.*, Variety, March 10, 1982, pp. 35-36.

[25] Moreover, the dramatic growth of prerecorded video tapes has greatly reduced any incentive for librarying. Prerecorded tapes have no commercials, they are not edited for television, their quality is superior to home "off-air" taping, and they are cheaper to rent than the cost of blank tape for home taping.

VI

THIS COURT SHOULD RESOLVE THE ISSUES CREATED BY THE COURT OF APPEALS' TEST FOR CONTRIBUTORY INFRINGEMENT

The Court of Appeals' test for contributory infringement represents an unprecedented expansion of contributory liability. Such a test will disrupt copyright and patent law unless corrected by this Court.

The Court of Appeals addressed the issue of contributory infringement by again ignoring the record and the trial court's findings of fact and declaring, on the sole basis of a treatise, that VTRs are not "suitable for substantial noninfringing use" (Pet. App. at 26). This is simply wrong. The trial court found to the contrary and it is indisputable that a wide range of VTR uses, *e.g.*, display of prerecorded videotapes, teletext, videotext, electronic photographs and home movies and the display of the extremely broad range of broadcast material which is either not copyrighted or of which the copyright holder has no objection to such use (*see, e.g.*, Pet. App. at 114). Indeed, the evidence at trial was that respondents' programming represents less than five percent of all commercial programming and none of the programming on public television (R.T. 314-15, 523-33, 549-50).

The Court of Appeals' only response to these facts was the assertion:

> That some copyright holders choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs (Pet. App. at 26).

With respect, we submit that this assertion misses the point. The issue here is whether sale of a product, VTRs, should be unlawful as an act of contributory infringement. If noncommercial home taping were found to be an infringement, but VTR sales were not held to be contributory infringement, respondents would not be "preclude[d]" from "protecting" their rights by suing the infringing parties. It would be absurd, however, to bar the sale of VTRs because a minority of producers objected to VTR use while the majority favored, or did not object to, VTR use, because of the benefits that VTRs bring such broadcasters and copyright holders. The Court of Appeals is allowing a tiny minority of producers to "preclude" *all* consumers, copyright holders and broadcasters from using VTRs for all purposes—even purposes which are admitted to be noninfringing and beneficial to other copyright holders. If respondents prevail on their general infringement theory, let them, if they wish, enforce their rights against such infringement, but do not allow them to impose their will on others under a contributory infringement rationale.[26]

The Court of Appeals again assumed facts contrary to the trial record and the trial court's finding of facts in discussing whether VTR manufacturers met the definition of contributory infringement.

> We adopt the district court's definition: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer . . . ." There can be no doubt that the corporate appellees meet this definition (Pet. App. at 27).

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[26] Respondents might find enforcement against the direct infringers impractical. This is doubtless true of copyright holders experiencing infringements through the use of photocopiers, cameras and tape recorders. It has never been suggested, however, that enforcement difficulties warrant a finding of contributory infringement. Respondents' enforcement problems result from their own decision to broadcast their programs over the public airwaves into the privacy of tens of millions of American homes in conjunction with a vast number of other producers who do not object to VTR use.

The trial court, however, found that the respondents had presented "no evidence" that petitioners' activities had induced or caused any of the acts of alleged infringement introduced at trial (Pet. App. at 96-97). It would expand the doctrine of contributory infringement to an enormous size—capable of devouring the photocopier, camera and audio tape recorder industries as well—to hold that a new technology was unlawful on the theory that without the technology the infringement would not occur.

VII

THE REMEDIES SUGGESTED BY THE COURT OF APPEALS ARE INEQUITABLE, IMPROPER AND WOULD IMPAIR OR ELIMINATE AN ENTIRE INDUSTRY

The Court of Appeals, after concluding that petitioners were liable as contributory infringers, directed the district court to consider an array of remedies including an injunction, statutory damages or a continuing royalty (Pet. App. at 28-29). It also instructed the district court that the "prospective harm" and "continued profitability of [petitioners'] businesses is of secondary concern" as there is "no right to expect a return on investment from activities which violate the copyright laws" (Pet. App. at 29).

An injunction on the sale of VTRs would eliminate the VTR industry in this country. An injunction against VTR sales would deprive the public of a device which provides numerous benefits, most of which are not even arguably infringing and many of which accrue to copyright holders.[27]

Statutory damages would also destroy the VTR industry in this country. The minimum amount of statutory damages per infringement is two hundred fifty dollars

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[27] *See, supra* at 2-4, 11-14.

($250), which under respondents' theory of contributory infringement would cause an astronomical damage award.

The Court of Appeals' suggestion that a continuing royalty be imposed by the district court demonstrates the extraordinary judicial activism engaged in by the Court of Appeals. Not only is this suggestion an unprecedented expansion of judicial authority, but it is an outright usurpation of congressional authority. Moreover, the proposal is completely unworkable. Unfortunately, it will stand as precedent until and unless this Court acts.

VIII

CONCLUSION

As the representative of nearly all VTR and blank video tape manufacturers and sellers of these products at the manufacturer's level, EIA/CEG urges the grant of the Petition for *Writ of Certiorari* filed by Sony Corporation of America in this case. The issues involve the viability, and perhaps the survival, of a major, rapidly growing, new industry.

Respectfully submitted,

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No. .....

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. Is reception at home by videotape recorder (followed only by private viewing at home) of free off-the-air television programming an infringement of statutory copyright on such programming?

2. If the answer to Question No. 1 is "Yes", does the manufacture, sale and/or advertisement of a home videotape recorder *per se* constitute contributory infringement whenever that videotape recorder is used for such reception at home?

3. Is "fair use" of a copyrighted work (17 U.S.C. § 107) limited to a "productive use", and precluded from being an "intrinsic use"?

4. Can a federal court impose a compulsory license on a copyright owner, and impose continuing royalties on an infringer, as a remedy for statutory copyright infringement?

5. By totally ignoring the findings of fact of the district court, and by holding retailers liable for contributory infringement when they never were alleged to have such liability, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

The parties to the proceedings below are UNIVERSAL CITY STUDIOS, INC., a corporation, and WALT DISNEY PRODUCTIONS, a corporation, Respondents herein, Plaintiffs-Appellants below, v. SONY CORPORATION OF AMERICA, a corporation, SONY CORPORATION, a corporation, CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation, DOYLE DANE BERNBACH, INC., a corporation, and WILLIAM GRIFFITHS, an individual, Petitioners herein (except Griffiths, who has no interest in the outcome of this petition or this case), Defendants-Appellees below.

The following petitioner-corporations have the following parent companies, partially-owned subsidiaries and/or affiliates.

Petitioner Sony Corporation has the following partially-owned subsidiaries: S-T Videocassette Duplicating Corp., Sony of Canada, Ltd., Sony de Venezuela, S.A., Sony Videobras Ltda., Sony Motoradio Comercio e Industria Ltda., Motoson Industria e Comercio Ltda., PMG Assurance Ltd., Sony Italia S.p.A., Brandsteder Electronics, B.V., Hispano Sony, S.A., Sony Danmark A/S, Fook Yuen Electronic Co., Ltd., Setron Electronics Pte. Ltd., Setron Electronics (Malaysia) Sdn., Bhd., Siedles Electronic Industries Limited, Orson Video Private Limited, Sony Saudi Arabian Company Ltd., Sony/PCL Inc., Aiwa Co., Ltd., Sony/Tektronix Corporation, CBS/Sony, Inc., Sony Eveready, Inc., Sony Prudential Life Insurance Co., Ltd., Sony/Wilson, Inc., Sony Taiyo Co., Ltd., Sowa Co., Ltd., Micronesian I Co., Ltd., Shibason Co., Ltd., Kyodo Security Agency Co., Ltd., Build Co., Ltd., Tokyo First Developing Co., Ltd., Hard and Soft Co., Ltd., CBS/SONY Family Club Inc., April Music Inc., CBS/SONY Record Inc., EPIC/SONY, Inc., CBS/SONY Publishing Co., Ltd., Japan Record Distribution Systems, Inc., Music Plaza Co., Ltd., CBS/SONY California Inc., CBS/SONY Hong Kong Ltd., Niigata Sowa Co., Ltd., Korea Sowa Co., Ltd., Kohki Co., Ltd., Korea Daitoh Electronics Ind. Co., Ltd., Korea Electronics Parts Ind. Co., Ltd.

Petitioner Carter Hawley Hale Stores, Inc. has the following partially-owned subsidiary: John Wanamaker Liberty Street, Inc.

Except as aforesaid, no petitioner has any parent company, subsidiary (except wholly owned subsidiaries) or affiliate within the meaning of Supreme Court Rule 28.1.

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No. .....

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SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit.

Petitioners Sony Corporation ("Sony" — manufacturer of a videotape recorder, or "VTR", called Betamax), Sony Corporation of America ("Sonam" — Sony's wholly-owned subsidiary, distributor of Betamax), Doyle Dane Bernbach, Inc. ("DDBI" — Sonam's former national advertising agency for Betamax), and four Betamax retailers Carter Hawley Hale Stores, Inc., Associated Dry Goods Corporation, Federated Department Stores, Inc. and Henry's Camera Corporation (the "VTR retailers"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on October 19, 1981.

Opinions Below.

The Opinion of the Court of Appeals rendered October 19, 1981 is reported at 659 F.2d 963 (9th Cir. 1981) — Appendix A hereto (cited herein as "Pet. App. 1 et seq."). The Opinion of the United States District Court for the Central District of California entered October 2, 1979 is reported at 480 F. Supp. 429 (C.D.Cal. 1979) — Appendix B hereto (cited herein as "Pet. App. 31 et seq.").

Jurisdiction.

The Judgment of the Court of Appeals was entered on October 19, 1981. A Petition for Rehearing with a Suggestion for Rehearing in Banc was timely filed on November 2, 1981. The Petition for Rehearing was denied by order dated January 12, 1982 — Appendix C hereto (Pet. App. 118). This Petition for Writ of Certiorari has been timely filed within ninety days thereafter (28 U.S.C. § 2101(c); Supreme Court Rule 20.2, .4). The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

This case involves Article I, § 8, Cl. 8 of the United States Constitution and several provisions of the Copyright Act of 1909 (the "1909 Act") and the Copyright Revision Act of 1976 (the "1976 Act"), respectively, each of which is printed in full in Appendix D hereto (Pet. App. 119 et seq.). The pertinent provisions of the 1976 Act are 17 U.S.C. §§ 101 (portions), 106. 107, 411, 501, 502(a) and 504. The pertinent section of the 1909 Act is former 17 U.S.C. § 1 (portions).

Statement of the Case.

This is an action for alleged infringement of statutory copyright. Jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a).

The Court of Appeals' opinion holds that all "home videorecording" of free off-the-air television broadcasts "constitutes copyright infringement", no matter the program. no matter that the recording is made "for private noncommercial use" (Pet. App. 12, 27, 30) — thereby branding over three million American families with home-use VTRs as lawbreakers and rendering them subject to all the potential liability that goes with direct infringement.[1]

The Court of Appeals' opinion also holds the manufacturers, distributors, retailers and national advertisers of home-use VTRs "legally responsible for the infringing activity" and "liable for such use" as contributory infringers

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[1] This is the first judicial decision in American legal history to find as copyright infringement either (a) conduct taking place entirely in the privacy of the home or (b) making a copy of anything solely for private personal use.

— for having done nothing more than to make VTRs avai able to the public for home use (Pet. App. 25, 27, 30, 97)

The Court of Appeals directed the district court to cor sider granting the relief sought by respondents — viz., a injunction against the further sale of home use VTRs, a well as statutory damages ($250 minimum damages pe infringement) assessed against petitioners for off-the-a home recordings made by VTR users (Pet. App. 28, 102 3; 17 U.S.C. §§ 502, 504; R.T. 3260, 3278). Alternativel the Court of Appeals authorized the district court to creat a "compulsory license" paid for with a "continuing ro alty" — a remedy neither sought by respondents nor pro vided for by statute or by case precedent (Pet. App. 28-9

Free off-the-air television is broadcast by at least 9 stations (another 1000-1500 low power stations are comin for the purpose of furthering "the public interest, conven ience, and necessity" (47 U.S.C. § 309(a)); the public re ceives it lawfully because it "is broadcast . . . for the u of the general public. . . ." (47 U.S.C. §§ 153(o), 605).

The home-use VTR (also called a videocassette recorde or "VCR") and the household TV receiver set are simil in that both receive free off-the-air television broadcastin They are different in that the household TV set displa ("performs") the television program on its picture tube f viewing simultaneously with the reception; in contrast, t VTR receives the television program by recording it on ta for play-back through the TV set, and thereby for viewin at a later time (Pet. App. 33, 39-41). This VTR "time shif enables members of the public to view programs which th otherwise would miss — *e.g.*, workers on a "night shif now can view "prime time" TV the next day (Pet. Ap 82, 108). The VTR thus provides the "societal benefit"

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[2] This is the first judicial decision in American legal history to h a manufacturer, distributor, retailer or advertiser of a device str "liable for such use" as a contributory infringer when the consu uses that device in the course of direct infringement. (The VTR retai herein were not even alleged to be contributory infringers.)

furthering the "public interest, convenience, and necessity."

Regardless of whether home reception of free off-the-air television is with a TV set or with a VTR, the public has paid the programming owner indirectly, one way or another, for the right to view the program. Seven hundred twenty-seven (727) of the existing nine hundred eighty-six (986) stations are "commercial" stations, meaning that they obtain their revenue (and use it to pay for their programming, whether self-produced or licensed from others) from advertisers — who pay to have their commercials interspersed and broadcast with the programming. The remaining two hundred fifty-nine (259) stations are "public/educational" stations, which obtain their revenue from individual and governmental contributions (Pet. App. 50-54, 79-80).

There is a wide variety and massive amount of programming broadcast by these stations which is available for home recording, and is recorded, by VTR owners with the consent of the program owners.[3] Also, most local-originated TV programming is recorded on tape prior to, or concurrently with, the broadcast—but the tape thereafter is erased and re-used without ever being registered for copyright; no protection exists against copying of such programs.[4] Since the home VTR thus is "used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)", the district court found the VTR to be a "staple item of commerce. Its uses are varied." (Pet. App. 92, 97, 104, 106-7, 114).

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[3] *E.g.*, entertainment programming (the *Spider Man* series), children's programming (*Mr. Rogers' Neighborhood*, the most widely viewed children's program in the nation, with three million families viewing daily), sports programming (Major League Baseball, National Football League, National Basketball Association, National Hockey League, National Collegiate Athletic Association), religious programming (National Religious Broadcasters, Faith Center), educational programming (the Bureau of Mass Communications of the New York State Education Department, the Center for Library Media and Telecommunications of the Board of Education of the City of New York, the New Jersey Public Broadcasting Authority, the Los Angeles City School Board of Education). Such available programming also includes motion pictures which are not copyrightable to start with (*e.g.*, 17 U.S.C. § 105) or on which copyright has expired (*e.g.*, *My Man Godfrey*). The NBC network, which owns TV programming, is itself owned by RCA — which sells its own brand of home VTR; NBC believes there is no reason why it and the VTR industry cannot grow and prosper alongside of each other. (Pet. App. 114; R.T. 1742-3, 1769, 2300-1, 2328-9, 2436-7; 2442-8, 2481-7, 2511-6, 2531-4, 2540-52, 2564-87, 2593-2606, 2615-6, 2623-40, 2823-44, 2863-2902, 2912-23, 2929-39, 3007-18; Def. Exh. OT, PD, PE, PF, PG, PH, PI, PK). Respondent Universal even agreed expressly to recent "guidelines" outlining still additional areas of available off-the-air programming — 127 Cong. Rec. No. 145, E 4751, October 14, 1981.

Respondents Universal City Studios, Inc. ("Universal") and Walt Disney Productions ("Disney"), collectively "U/D", license their programming to commercial stations, for broadcast at times chosen by the stations. U/D desire that each broadcast of their programming be viewed by the maximum possible number of viewers, because U/D believe that larger audiences mean larger license fees (Pet. App. 35-39, 50-54, 110). All of U/D's televised programming taken together constitutes less than 5% of commercial station broadcasting, and constitutes no part whatsoever of public/educational station broadcasting (R.T. 314-5, 532-3, 549-50). U/D are the only copyright owners ever to bring an infringement action against home recording (television or radio).

U/D did not seek to hold anyone liable for direct infringement by home recording.[5] U/D sought to hold Sony, Sonam and DDBI liable as contributory infringers based on nothing more than the manufacture, sale and advertisement of Betamax. U/D sought to hold the four VTR retailers liable as direct infringers for demonstration recording in their stores.[6]

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[4] Def. Exh. OV; R.T. 1740-1. 17 U.S.C. §§ 301, 411(a).

[5] Defendant Griffiths was a Betamax owner, alleged to have infringed by home recording but granted immunity.

During a five week trial, U/D introduced evidence of 32 instances[7] of home recording of free off-the-air TV, by four Betamax owners.[8] U/D knew of no other home recording of their works (R.T. 392-5, 1212) and did not seek a finding of copyright infringement as to any other motion pictures (R.T. B 175). As to these four Betamax owners, Griffiths had recorded five Universal motion pictures; his practice is "to record, to watch and erase and reuse" his videotapes. Soule had recorded two Universal motion pictures and intended to erase them without viewing at all; normally he watches once and erases. Lowe or his son had recorded one Universal film, and six Disney cartoons for Lowe to watch with his son after work and then to erase. Wielage had recorded the rest, to watch alone or with a few friends, and then to erase (Pet. App. 33, 43-47).

No petitioner "in any way induced or caused to be made any of the copies at issue" (Pet. App. 93-4, 96-7, 98; R.T. 810-11, 866-70, 1567-70, 1576, 1578-9, 1582, 1586, 1593-4, 1616, 1651-3, 1675, 1680-1, 1686, 1696, 1939).

Each side also introduced into evidence a survey of home recording in general, based on 17,000 Betamax owners. Neither survey showed any recording of any U/D motion picture. They did show, in essence, that the bulk of Betamax usage (like the 32 instances in issue) is to record a program

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[6] Store demonstration recording is not an issue in this Petition inasmuch as both the district court and the Court of Appeals held it was not infringement (Pet. App. 29, 48-49, 87-9).

[7] Viz., 18 copyrighted motion pictures of Universal, 14 copyrighted motion pictures of Disney.

[8] Viz., defendant Griffiths, non-defendants Wielage, Lowe and Soule. All instances of recording were prior to the 1976 Act, except for Wielage's recording of one Universal and one Disney motion picture.

(including commercials), to playback once within a few days for viewing within the family, then to erase and to record something else — viz., "time-shift" (Pet. App. 47-8, 107).

U/D not only failed to offer any evidence of damage caused by home recording; they "admitted that no actual harm to their copyrights has occurred to date". They further failed to offer any evidence of any detrimental effect to be caused by home recording upon the potential market for, or value of, any of the motion pictures in issue; in fact, the evidence showed that home use recording "does not reduce the market for plaintiffs' works" (Pet. App. 50, 76, 87, 102, 107, 108, 115; R.T. 288-94, 394, 542-4, 1055, 1206-7, 1233, 1256-7, 1284-7 1340-1, 1376, 1387, 1493-4, 1763, 2241, 2251, 2269-70, 2281-9, 3260, 3268).

The district court's opinion held that none of the 32 instances of home recording in issue was a direct infringement (Pet. App. 34, 56-7, 65, 87, 115, 117) — and further held that there could have been no contributory infringement (Pet. App. 34, 89, 115, 117).

The Court of Appeals reversed the district court in all respects as to home recording, based on sweeping pronouncements of law — literally ignoring all the district court's findings of fact, yet not purporting to assert that even one of them was "clearly erroneous" (Rule 52(a), Fed. R. Civ. Proc.).

Within weeks after the Court of Appeals issued its opinion, Universal sued 42 other manufacturers, distributors and advertisers engaged in home VTR supply, including RCA, Zenith, Sears, Panasonic, Sanyo and Toshiba and representing essentially the entire balance of the home VTR industry — again, in the Central District of California (the "RCA *et al.* case" No. 81-5723 FW).

REASONS FOR GRANTING THE WRIT

1. This Court Has Not Settled, but Now Should Settle, the Question of Whether Reception at Home by Videotape Recorder (Followed Only by Private Viewing at Home) of Free Off-the-Air Television Programming Is an Infringement of Statutory Copyright on Such Programming.

A. The Importance of the Question.

Rarely has there been a copyright case of greater public, commercial, and academic[9] interest. The core question, the applicability of the 1909 Act and the 1976 Act to free off-the-air home videotape recording, in itself is an "important question of federal law which has not been, but should be, settled by this court". Moreover, the Court of Appeals' opinion raises three other related issues, each more general and perhaps equally important — viz., the limitation of "fair use" to "productive use", compulsory licensing as a remedy for copyright infringement, and contributory infringement of a product supplier based on strict liability. These are "questions whose resolution will have immediate importance far beyond the particular facts and the parties involved . . . ."[10]

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[9] Major law review articles on the Betamax case include: *Home Video Recording and the Copyright Act*, 6 Art & Law 19 (1980); *Videotape Recorders: Copyright Infringement?*, 33 Baylor L. Rev. 695 (1981); *Copyright Infringement in Video Recording*, 30 Catholic Univ. L. Rev. 621 (1981); *Home Use*, 3 Comm/Ent L. Journ. 53 (1979); *Betamax*, 1977 Duke L. Journ. 1181 (1977); *Audiovisual Recorders*, 58 Nebraska L. Rev. 467 (1979); *Fair Use Doctrine*, 15 New England L. Rev. 661 (1980); *Betamax*, 22 N.Y.U. Rev. Law & Social Change 497 (1978-79); *Betamax*, 18 PEAL 95 (1979); *Copyright Act of 1976: Video Recordation*, 42 Univ. of Pittsburgh L. Rev. 317 (1981); *Home Videotape Copying*, 1 Univ. of Puget Sound L. Rev. 192 (1977); *Home Videotape Recorders - Copyrights*, 13 Univ. Richmond L. Rev. 279 (1979); *Betamax*, 8 Rutgers Journ. of Computers, Technology and Law 85 (1980); *Betamax*, 21 Santa Clara L. Rev. 49 (1981); *Home Videorecording*, 52 So. Cal. L. Rev. 573 (1979); *The Betamax Case*, 31 Stan. L. Rev. 243 (1979); *The Betamax Case*, 10 Toledo L. Rev. 203 (1978); *Recording of Televised Copyrighted Works in the Home*, 55 Tulane L. Rev. 1295 (1981); *Fair Use*, 66 Virginia L. Rev. 1005 (1980); *The Betamax Case*, 37 Wash. and Lee L. Rev. 1277 (1980); *Home Video Recording*, 81 W. Va. L. Rev. 231 (1979); *Betamax and Copyright*, 1 Whittier L. Rev. 229 (1979). Most of these (but not all), upon varying grounds, advocate the district court's resolution of the case.

The impact of the case is without parallel in any prior copyright case. The case has been famous since the day it was filed, and the decision of the Court of Appeals was featured prominently (and critically) in virtually every major national newspaper. The product in issue, the home VTR, now is used in over three million American homes by about twelve million citizens. For the first time since the advent of television, people can view the programs they need or want to view — not just the programs that happen to be broadcast at the time they are able to view. VTRs have been described as part of the "Most Promising Development" in television during the 1970's (*Time* magazine, January 7, 1980, p. 84).

American sales of VTRs and tape in 1982 (unless halted by the courts) will run over a billion dollars. American businesses are engaged in the manufacture of tape and raw materials therefor. Sonam's Alabama plant alone, which makes tape but not recorders, employs 1,800 people; these figures are dwarfed by the number of sales employees of such large American distributors of VTR's as Sonam, RCA, Zenith and Sears. Thousands more employees of large retail stores and electronics shops, such as the VTR retailer petitioners, and of national advertising agencies for VTR distributors, derive significant parts of their income from VTR sales. The decision of the Court of Appeals threatens a complete halt to all such activity. Such factors frequently have motivated the exercise of this Court's jurisdiction in the past, and they should do so here.[11]

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[10] Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S.Ct. v, vi.

Whether the statute deems infringement the private, noncommercial recording in the home of material broadcast over the public airwaves is a question of as much import as those reviewed by this Court in its five copyright decisions of the last fifteen years. For instance, home video recording is as thorny a problem as the applicability of the copyright laws to community antenna television in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). The immediate economic consequences and the number of persons affected are greater than in the prior cases involving photocopying, *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), and amplification of radio broadcasts by small retail establishments for the enjoyment of their customers, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).[12]

"Fair use" has been developed in the lower federal courts since *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) but never has been examined by this Court, and copyright contributory infringement has not been examined by this

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[11] Besides the factor of important federal questions, immense amounts of money are involved as in *Commissioner v. Standard Life & Acc. Ins. Co.*, 433 U.S. 148, 151, n.5 (1977) ("substantially more than $100 million is in dispute"). Many individuals are potentially involved or affected by the decision below, as in *Patterson v. Lamb*, 329 U.S. 539 (1947) (status and claims of thousands of World War I draftees).

[12] The fifth case, *Goldstein v. California*, 412 U.S. 546, 555 (1973), involving a claim that federal copyright law preempted a California record piracy statute, is the fount of frequent argument that copyright is to provide "control over *sale* or *commercial use* of copies" and to "preclude others from copying . . . for *commercial* purposes" (emphasis added).

Court since 1911. The confusion in the lower federal courts over these central copyright issues now has reached new levels with the Court of Appeals' decision herein; only a review by this Court can return some order to the application of the copyright laws. Likewise, the scope of copyright remedies has been distorted by the Court of Appeals and is an important issue which can be put right only by this Court in this case.

B. This Court Should Settle the Question Now.

The Court of Appeals remanded the case to the district court to consider three affirmative defenses of petitioners[13] and to award relief (Pet. App. 30), but the defenses are factual and unique to petitioners, to respondents and to the 32 allegedly infringed works in issue. These defenses have nothing to do with the sweeping determinations of law by the Court of Appeals which now affect all TV program owners, all VTR and tape suppliers, and the public.

Review of the decision of the Court of Appeals on the issues of legislative intent, fair use, contributory infringement and scope of remedies should not await the remand ordered by the Court of Appeals. Any delay for a remand not only will leave unsettled the important federal questions presented by this case, but also will threaten the home recording practices of millions, and will leave open to imminent destruction the livelihoods of those involved in the home VTR business. The Court of Appeals directed the district court to "reconsider" granting respondents' request for "an injunction prohibiting the sale of Betamax". The Court of Appeals also said "statutory damages may be appropriate" (petitioners' continuing liability for $250-

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[13] Viz., laches and estoppel, copyright invalidity, and unclean hands/ copyright unenforceability.

$50,000 statutory damages for every infringing recording would stop all VTR sales as effectively as an injunction) (Pet. App. 28, 102-3).[14] As said in one of the articles relied upon by the Court of Appeals to support its opinion, "In order to make a finding of infringement, a court must be willing to prevent the manufacture of a very popular technological advancement." (81 W. Va. L. Rev. 231, 250). The Court of Appeals obviously is willing.

In prior copyright cases, this Court has not waited for a district court decision on ancillary factual issues or on relief before clarifying fundamental questions of federal law. In *Williams & Wilkins Co., supra*, this Court reviewed the federal copyright law issue without awaiting a remand to determine copyright ownership; in *Fortnightly Corp., supra*, certiorari was granted on the issue of infringement prior to a remand to determine relief; in *Teleprompter Corp., supra*, certiorari was granted prior to a remand for further proceedings.[15]

Since the RCA *et al.* case was filed in a district court subject to the commands of the Ninth Circuit panel in the instant case, no correction of the fundamental errors in copyright law made by the Court of Appeals can be made in this new case.[16] Only this Court can resolve the status of home video recording before petitioners are threatened on remand and the rest of the home VTR industry is drawn into the swamp created by the Court of Appeals.

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[14] The Court of Appeals added, "In fashioning relief, the district court should not be overly concerned with the prospective harm to appellees" and "the continued profitability of appellees' businesses is of secondary concern" (Pet. App. 29).

[15] Other recent examples of the grant of certiorari, prior to further district court proceedings made necessary by reversal, are *California Brewers Ass'n. v. Bryant*, 444 U.S. 598 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); and *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

[16] Universal already is telling the district court in the RCA *et al.* case that the Ninth Circuit has rendered "a judicial determination, binding on this [District] Court" with respect to "identical activities".

Although the Court of Appeals' decision prompted instant Congressional reaction (S. 1758; H.R. 4808), only this Court can settle the question of whether home video recording has been, now is, or will be (until and unless the 1976 Act is amended) infringement. No future amendment by Congress (if any there be) can resolve this question (*United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)).

Although U/D to date have not sought to hold any VTR owner liable for home video recording, there is no assurance that other copyright owners will not do so if this Court does not settle the question promptly.

Although this case involves home *video* recording, opportunists in the record industry now are using the Court of Appeals' decision to assert that off-the-air home *audio* recording likewise is infringement — thereby reneging on assurances they made to Congress in 1971 to procure copyright protection for recording artists (Public Law 92-140, 85 Stat. 391).[17] This Court should settle the off-the-air home *video* recording question before another conflagration erupts on the home *audio* recording question.

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[17] *E.g.*, in June 1971 Stanley M. Gortikov, president of the Record Industry Association of America, Inc., told Congress:

> "[T]he pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on home-recording equipment. We in the industry certainly have known that such amateur practices go on in the home, and we realistically recognize that no such enforcement is possible, and certainly none is intended." (Hearings before Subcommittee No. 3 of the House Judiciary Comm., 92nd Cong., 1st Sess. on S. 646 and H.R. 6927, June 9-10, 1971, p. 26).

On December 15, 1981, the same Mr. Gortikov wrote in *The Washington Post*, "There is no 'legal immunity' for home audio taping in the current copyright law. There is no immunity for home audio taping in any of the statutory exemptions, or anywhere else in the 1976 act or its legislative history".

C. Home Videotape Recording of Free Off-the-Air TV Is Not Copyright Infringement.

Under the 1909 Act, the copyright owner was given the "exclusive right" to "copy" the copyrighted work (17 U.S.C. § 1(a)); under the 1976 Act, the copyright owner is given "exclusive rights" to "reproduce" the copyrighted work (17 U.S.C. § 106(1)).

However, copyright statutes do not have to give, and in practice do not give, a copyright owner control over all uses of the copyrighted work (*Fortnightly Corp., supra,* p. 393). Under the 1909 Act, the courts developed exceptions to the § 1 "exclusive right" under a doctrine of "fair use"; under the 1976 Act, exceptions or limitations as to the § 106 "exclusive rights" are codified, including "fair use" in general (§ 107) and various express usages in particular (§§ 108-118).

i. *Legislative History of the 1976 Act.*

The District Court examined legislative history of the 1976 Act at length. In contrast, the Court of Appeals said that the 1976 Act "is clear and unequivocal on its face" and hence that legislative history "is entirely beside the point" and "is not relevant" — and that resort to it "is entirely unnecessary" (Pet. App. 11-12). (Grossly inconsistently, the Court of Appeals acknowledged "recognition of an exemption for the home recording of sound recordings", an exemption which exists only by resort to the same legislative history (Pet. App. 9).)

The Court of Appeals thereby contravened numerous decisions of this Court which establish that the legislative record must be examined and Congressional intent honored. *Train v. Colorado Public Interest Research Group,* 426

U.S. 1, 9-10 (1976); *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940). In *Train* (p. 9), this Court held it error to exclude reference to legislative history, stating:

> "To the extent that the Court of Appeals excluded reference to the legislative history of the [Act] in discerning its meaning, the court was in error. As we have noted before: 'When aid to construction of the meaning of words is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination" '."

The Court of Appeals said that "our concern must be whether Congress has exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107-118." (Pet. App. 7). But even an abridged review of legislative history shows that Congress regarded and intended home recording, video and audio, to be fair use and thus precisely within the exceptions or limitations specified in § 107 — and therefore never made a particular express statutory exception as to either.

Revision of the 1909 Act into the 1976 Act commenced with the Legislative Appropriations Act of 1955; legislative history of the 1976 Act literally spans "the 20 year copyright revision process" (Pet. App. 11).

In 1961, the Register of Copyrights reported to Congress:

> "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."

In 1965, the Register of Copyrights further reported to Congress about "the imminent development of home video tape recordings."

The Report of the House of Representatives Committee, on the Judiciary, pertaining to an interim 1971 Amendment to the 1909 Act, said:

> "... it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today. ..."

Just a few days prior to passage of this 1971 Amendment, the following exchange took place on the House floor involving Rep. Kastenmeier (D. Wisc.), Chairman of the Subcommittee responsible for the 1971 Amendment:

> "Mr. Kazen (D. Tex.): In other words, if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> "Mr. Kastenmeier: This is not included in the bill ... this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. ..."

117 Cong. Rec. 34749 (October 7, 1971).

The 1976 Act ultimately was passed in its entirety, with nothing contrary ever appearing in the legislative history on the subject of off-the-air home recording.

The point is not that "There was never a considered review of the home video recording problem" (Pet. App. 10-11); the point is that Congress' unequivocal attitude toward home recording, video and audio, was manifested clearly in legislative history during its review of other problems.

ii. *Fair Use.*

Certain uses of a copyrighted work traditionally have been allowed under the rubric "fair use" even though the use literally falls within the copyright owner's "exclusive rights" as defined by statute and even though the copyright owner has not consented to the use.

Since fair use "is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts" (1976 Sen. Comm. Rep.). The facts of this case showed only "time-shift" usage of U/D's works. As one commentator aptly said of the VTR, "Some uses infringe; others do not" (31 Stan. L. Rev. 243, 252 (1979)). Off-the-air recording with a VTR, followed by playback for commercial entertainment at a discotheque, obviously infringes (*American Broadcasting Companies, Inc. v. Le Disco Inc.*, Civ. 80-2724 (D. Mass. 1980)); on the other hand, "a court should . . . allow temporary taping for delayed viewing purposes [time shift] . . . . Temporary copying simply achieves the access the copyright owner wants viewers to have anyway. . . ." (31 Stan. L. Rev. 243, 263, 255 (1979)). Swapping tapes, duplicating tapes, recording off cable TV or pay TV, librarying, etc. present other differing and interesting legal questions, but they are not this case[18] — this case is only time-shift (Pet. App. 55-6).

Considering that the home video recording in issue is only a necessary and transitory step between free off-the-air TV broadcasts and some of the home viewing for which TV program owners have been paid and to which they have consented, such recording should be recognizable immediately as fair use (using nothing more than the "rule of reason" on which fair use was founded).

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[18] Such potential home VTR usages are not in issue and are irrelevant to this case (*Teleprompter, supra*, p. 405 n. 10).

Section 107 provides that "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include" (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used vis-a-vis the whole, and (4) the effect of the use upon the potential market for or value of the work (Pet. App. 123). These factors are neither "definitive nor determinative" (1976 Sen. Comm. Rep.), viz., neither exclusive nor conclusive. The Senate and House Committee Reports on the 1976 Act recite identically that "There is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change", and "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way".

"Since the issue of fair use is one of fact . . . the clearly erroneous standard of review is appropriate." (*MCA v. Wilson*, 211 U.S.P.Q. 577 (2nd Cir. 1981)). The district court reviewed the specific home recording presented to it, made findings of fact using each of the statutory "factors", and made an ultimate finding that the home use recording in issue was fair use (Pet. App. 66-87).

The Court of Appeals did not "disturb" any of these factual findings as being "clearly erroneous" — it simply ignored them and substituted therefor contrary assumptions, and contrary statements from a treatise (see "Reason 5" hereinafter).

As to the "purpose" of home recording, the district court found it was "to increase access" of VTR owners at home to "material voluntarily broadcast to them free of charge over public air waves", such as for those who had "to work" at broadcast time (Pet. App. 82, 108).

The Court of Appeals denigrated the purpose simply as "copying of entertainment works for convenience".[19] The Court of Appeals held that home video recordings of U/D's motion pictures are used for the same purpose as the motion pictures themselves — viz., for home viewing;[20] the court called this "intrinsic use" — as distinguished from "productive use" wherein copyrighted works are used by scholars, authors or the like in the course of producing new works (Pet. App. 14-15, 19).

The Court of Appeals reviewed *ad seriatim* the four factors of § 107 but, even before doing so, already had concluded from the "purpose" factor alone that "the fair use doctrine does not sanction home video recording. Without a 'productive use,' *i.e.*, when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." (Pet. App. 18).

The Court of Appeals held, as to "purpose and character of the use", in the abstract and as a matter of law, that

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[19] The Court of Appeals failed to distinguish among the various possible "types" of purposes of Betamax use. First, of course, the *types of programs* copied may vary — types of programs whose owners do not, or cannot, oppose home recording are set forth in the Statement of Facts. Even as to U/D's programs, the fair use factors apply differently to different *types of uses*. Recording to watch one time and later erase ("time-shifting" — the kind of use in evidence) surely is less substantial and has a different economic effect than the hypothetical building of large tape libraries for repeated reviewing (there is no evidence of librarying as to U/D works). The Court of Appeals, however, swept all types of programming and all types of uses into its holding against fair use without examining the differences.

[20] In fact, the premise of the holding literally is erroneous. The "original" is used commercially to gain revenue by licensing; the "copies" are used non-commercially merely to consummate the private home viewing contemplated by such licensing.

"Since the copies made by home videorecording [U/D's motion pictures or anything else] are used for the same purpose as the original, a finding of fair use is not justified" (Pet. App. 23) — viz., no other fair use "factor" need be considered. This holding has public impact far beyond the home recording question — it poses a "certworthy" issue of its own. (See "Reason 2" hereinafter).

As to the "effect" of home recording on the potential market for or value of U/D's works, the district court found that home recording had caused "no harm to date" and "does not reduce the market for plaintiffs' works". (Statement of the Case, *supra*, p. 7).

The Court of Appeals ignored these findings and simply assumed "it seems clear that it tends to diminish the *potential* market for appellants' works." (Pet. App. 25). The Court of Appeals further said the district court "did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by video recorders" (Pet. App. 24); in fact, there was no evidence of mass reproduction of any of U/D's works — 31 of the 32 works in issue had been recorded once, one had been recorded twice. Moreover, any theoretical "mass reproduction" necessarily would be limited to those members of the public to whom U/D's programs were broadcast; and any theoretical "cumulative effect" could be nothing more than a contribution to the home viewing intended when the program was broadcast.[21] "The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so." (*Teleprompter, supra*, p. 408).

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[21] Congress has exempted from infringement cable systems which enhance viewing within the local geographical service area of the broadcast station, because there is no harm to the copyright owner (17 U.S.C. § 111; H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 90 (1976)); the same reasoning supports Congress' manifested intent that home VTR usage, which does only the same, was fair use.

As to "nature of the copyrighted work", the district court found that the "most important aspect" was that the case involves only works "which plaintiffs voluntarily choose to have telecast over public air waves to individual homes free of charge" (Pet. App. 79-80). U/D voluntarily exploit their works by commingling them with all the other programs on free off-the-air TV — programs whose subject matter "nature" runs the gamut, programs which have been "released to the public" (*Fortnightly, supra*, p. 400; *Teleprompter, supra*, p. 410), and 95+% of which programs has been available for unchallenged home reception by VTR. U/D have "no control over the segment of the population which may view the program" (*Teleprompter, supra*, p. 412); and they should have no control over "how" the population "receive" the program so as to view it. The overall relevant "nature" of U/D's works thus should be that U/D have consented to, or have assumed the risk of, home recording thereof. The Court of Appeals simply "failed to see" how the foregoing was "relevant" to fair use (Pet. App. 20-21).

As to the "amount" copied, the district court recognized that this factor "is inextricably bound with the issue of harm" (Pet. App. 82) — of which there was none. Overlooking the reason behind the rule, the Court of Appeals said the amount of copying "clearly weighs against a finding of fair use." (Pet. App. 21).

2. The Decision Below Is in Conflict With Decisions of Other Courts of Appeal on the Question of Whether "Fair Use" of a Copyrighted Work (17 U.S.C. § 107) Is Limited to a "Productive Use", and Precluded From Being an "Intrinsic Use."

As set forth in "Reason I. C, ii", *supra*, pp. 19-20, the Court of Appeals held that home recording of off-the-air TV was precluded, *per se*, from being fair use because it was "intrinsic use" — viz., use of the copy for the same purpose as the original. This arbitrary and stifling interpretation of fair use calls for immediate review by this Court before it is repeated and applied to improperly resolve other pending and future copyright cases.

The Court of Appeals recited that, except for two cases — *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), and the district court opinion herein — fair use "has always had to do with the use by a second author of a first author's work." (Pet. App. 15).

The Court of Appeals expressly clashed head-on with the Court of Claims and the latter's decision in *Williams & Wilkins Co. v. United States*, *supra* (which found fair use where Xerox reproductions of medical journal articles were used for the same purpose as the original articles). The Court of Appeals called *Williams & Wilkins Co.* the "Dred Scott decision of copyright law", said it "is clearly not binding on this circuit", called "its underlying rationale singularly unpersuasive", and said that "the Court of Claims' approach — in treating intrinsic use of such work as within the bounds of fair use — created doctrinal confusion that raises the spectre of the evisceration of the traditional workings of the copyright scheme." (Pet. App. 15, 17).

The Court of Claims and the Court of Appeals are in square conflict on a highly important question of copyright law whose generality far transcends the question of home recording. The question is ripe for resolution by this Court.

3. The Decision Below Is in Conflict With Applicable Decisions of This Court on the Question of Whether the Manufacture, Sale and/or Advertisement of a Staple Item of Commerce (the VTR) Per Se Constitutes Contributory Infringement Whenever That Item Is Used for Direct Copyright Infringement.

The widespread importance and impact of this question is that, assuming *arguendo* that home recording of U/D's works is copyright infringement, holding VTR suppliers liable therefor as contributory infringers (for having done nothing more than to make VTRs available) effectively will deprive the public of VTRs for any purpose; on the other hand, if U/D had been limited to challenging the direct infringer, at least the public could continue to be supplied with VTRs and to receive the other 95+% of free off-the-air television.

This Court has made it clear that the suppliers of a staple item of commerce — viz., an item suitable for substantial non-infringing use — are not *per se* contributory infringers when an owner of the item uses it for direct patent infringement;[22] to hold otherwise "would block the wheels of commerce."[23] And the same principle has been applied by this Court to copyright infringement.[24]

The evidence showed, and the district court found, that "The videotape recorder, like a[n audio] tape recorder, is a staple item of commerce. Its uses are varied"; and that the VTR "is also used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)" (Statement of the Case, *supra*, pp. 4-5).

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[22] *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488-9 (1964). 35 U.S.C. § 271(c).

[23] *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912); *overruled on other grounds* by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

[24] *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-3 (1911).

The Court of Appeals ignored the findings of fact. It said, in substitution therefor, "Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming" and "Virtually all television programming is copyrighted material"[25]; and thereupon based its non-sequitur and erroneous conclusion that "Therefore, videotape recorders are not 'suitable for substantial noninfringing use' " (Pet. App. 25-26).

The Court of Appeals and the district court agreed that "One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer'." (*Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). But the district court found that there was no evidence that "defendants in any way induced or caused to be made any of the copies at issue"; the district court further noted that petitioners "have neither the right nor the ability to control Betamax purchasers' use of the machine in their homes". (Statement of the Case, *supra*, p. 6).

The Court of Appeals said, arbitrarily and with no pretense of evidentiary basis, that "there is no doubt that appellees have met the other requirements for contributory infringement — inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable" (Pet. App. 27).

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[25] This latter "fact" was based on a treatise reference. It is misleading in view of all the "copyrighted material" whose owners consent to home recording. It is erroneous, in principle, in light of the evidence of vast televised programming which is "fixed" on videotape when televised and hence "copyrighted" in a sense, but which thereafter is erased so as to make deposit, registration, and any infringement action, impossible. (17 U.S.C. § 411).

The district court followed the aforesaid settled law of this Court and held that Sony, Sonam and DDBI could not be contributory infringers as to any of the home recording in issue. In contrast, the Court of Appeals defied the applicable decisions of this Court and held VTR manufacturers, distributors, retailers and advertisers to be liable *per se* as contributory infringers for all off-the-air home recording by VTR owners.

The only rationale ever articulated by commentators for holding VTR suppliers as contributory infringers is that it is easier for U/D to identify and sue a small number of VTR suppliers than to identify and sue a large number of VTR users (*e.g.*, 81 W. Va. L. Rev. 231, 247). However, neither legal precedent nor fairness to petitioners can justify making U/D's task easier by such a holding. The other side of this coin is that two non-consenting copyright owners thereby are being enabled to destroy all home VTR usage and the public benefit therefrom — *Aiken, supra*, p. 162, posed a similar "highly inequitable" potential circumstance as to radio and this Court refused to let it happen.

The findings of fact of the district court, coupled with the holding of the Court of Appeals, mean that the manufacture, sale and/or advertisement of a VTR, a staple item of commerce, *per se* constitutes contributory infringement whenever that VTR is used for off-the-air home recording. The conduct of the Court of Appeals in ignoring the findings of fact cannot mask the fact that it thus has decided a federal question of copyright contributory infringement in a way squarely in conflict with applicable decisions of this Court.

4. This Court Has Not Settled, but Now Should Settle, the Question of Whether a Federal Court Can Impose a Compulsory License on a Copyright Owner, and Impose Continuing Royalties on an Infringer, as a Remedy for Statutory Copyright Infringement.

Apparently sensing that either an injunction or the imposition of statutory damages would bring home video recording to a halt, the Court of Appeals lent its authority to an unsupported suggestion in a treatise and told the district court that "*a judicially created compulsory license*" with a "*reasonable*" and "continuing royalty . . . may very well be an acceptable resolution" (Pet. App. 28-29).

However, there is no statutory provision nor decisional precedent for compulsory licensing as a remedy for any copyright infringement. Respondents did not ask for such relief. The average copyright owner in the average copyright case probably does not want it and should not be subjected to it. This is another important and recurring "trouble" that has escaped from the Pandora's box created, and left open, by the Court of Appeals — and which this Court must settle promptly, before it sends the district court on a futile mission and also infects every other copyright infringement case now pending or hereafter filed.

5. The Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The district court's opinion constituted its "factual findings" (Pet. App. 35; Rule 52(a), Fed. R. Civ. Proc.). The Court of Appeal said this "elaborate, painstaking, and thoughtful opinion . . . carefully outlined the facts" (Pet. App. 3). Under the accepted and usual course of judicial proceedings, a court of appeals does not disturb a district court's finding of fact unless it is "clearly erroneous", which means that "on the entire evidence" the court of appeals must be left with a definite and firm conviction that a mistake has been committed.[26]

The Court of Appeals did not "disturb" even *one* finding of fact by the district court (nor did U/D ask it to do so); the Court of Appeals simply ignored *all* these findings and substituted therefor contrary generalized statements based on assumptions or taken from a treatise. The opinion of the Court of Appeals does not mention, pro or con, a single finding of fact by the district court.

The Court of Appeals' reversal of the district court's holdings was founded upon, and depended upon, its substitution of assumptions of fact in lieu of the district court's findings of fact. With the uncontroverted evidence showing, and with the district court finding, that the home VTR was a staple item of commerce and that petitioners had not caused or induced any of the home recording in issue, there was no way the Court of Appeals could hold petitioners as contributory infringers if it adhered to the accepted and usual course of judicial proceedings.

The Court of Appeals' reversal as to fair use similarly was founded on repeatedly ignoring facts and substituting assumptions ("Reason 1, C. ii", *supra*).

In addition to having ignored findings of fact, the Court of Appeals held the four VTR retailers liable as contributory infringers for home recording direct infringement (Pet. App. 25, 30) — when there was not, and could not have been, any such allegation. The VTR retailers had been alleged only to be direct infringers and only because of store demonstration recording (Pet. App. 87). Three of the four retailers had not sold VTRs used for any home recording in issue (Pet. App. 94).

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[26] *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-5 (1948); *Thomas v. SS Santa Mercedes*, 572 F.2d 1331, [illegible] 1978).

The district court recognized that it was "reviewing the limited claims of specified parties in a particular factual setting" and that it was "bound by the factual context of this litigation" (Pet. App. 34, 55-6, 81-82, 115). The district court made its findings of fact based on the evidence before it, and resolved the case or controversy about "time shift" presented to it.

In contrast, the Court of Appeals ignored the factual issues which made up the lawsuit, ignored the evidence and ignored the findings. Substituting contrary assumptions and contrary treatise references for the evidence and the findings, the Court of Appeals issued sweeping and generalized broadsides — holding all off-the-air home video recording (no matter the program, no matter the purpose) to be copyright infringement and holding everyone before it, alleged to be liable or not, to be a contributory infringer for all such recording. Only this Court can correct such gross deviation from the accepted and usual course of judicial proceedings — deviation that amounts to a denial of due process of law.

Conclusion.

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
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Donald E. Sloan,
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Sony Corporation of America, et al.

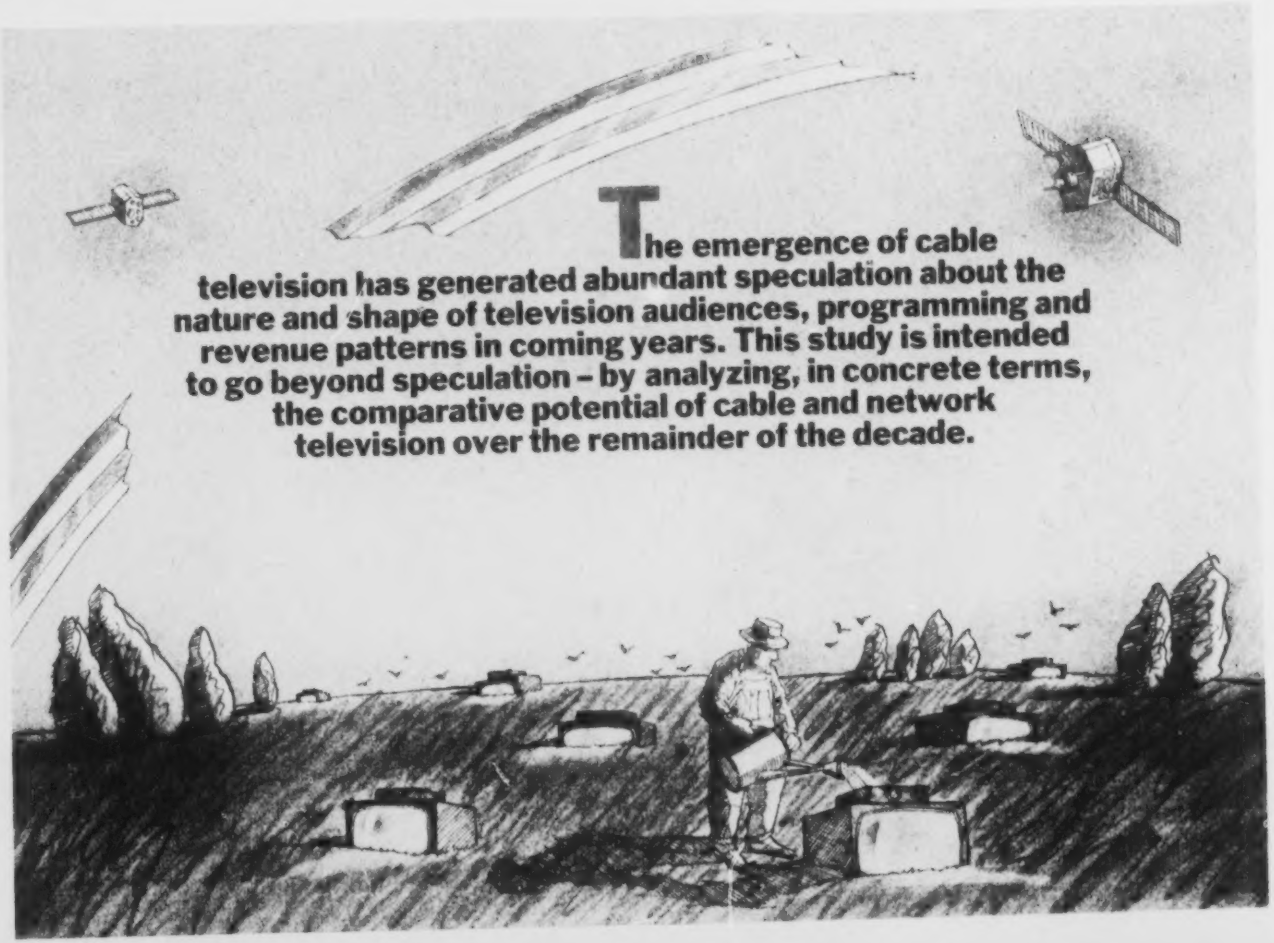
Of Counsel:
Marshall Rutter

March 11, 1982

YOU AND CBS: A MARKETING PARTNERSHIP

THE VIDEO MARKETPLACE IN 1990:

[illegible]



The emergence of cable television has generated abundant speculation about the nature and shape of television audiences, programming and revenue patterns in coming years. This study is intended to go beyond speculation – by analyzing, in concrete terms, the comparative potential of cable and network television over the remainder of the decade.

Over the past few years, futurists have demonstrated what almost amounts to a fixation with the changing media landscape. Their collective prognostications have centered on the impact of cable television. While no one questions that the television marketplace is changing, and that cable television is the major stimulant of that change, experts disagree as to the effect of this new television form on the existing broadcasting system. One noted forecaster, John Naisbitt, has characterized the networks as dinosaurs, headed for extinction.

On the contrary, those of us who are riding the so-called network dinosaur find the big beast very much alive—and healthier than ever. The three television networks completed a strong 1981, with revenues estimated at $5.3 billion, following a decade of growth which saw advertising revenues expand from $1.7 billion in 1970 to $4.8 billion in 1980. In 1982, three-network sales growth is expected to continue at a significant rate.

But it is not today the futurists warn us about, it is tomorrow. Just how severe a threat is cable to network television? Are we riding an aging reptile toward inevitable obsolescence?

By 1990, the video marketplace will undergo diversification and growth that will be of great importance to advertisers, their agencies and the broadcasting industry. Placed in perspective, the impact of cable television on the networks comes into focus.

The cable industry's own projections have been used in this presentation to ensure objective analyses. What follows is a hard, cold look at the potential of cable over the remainder of the decade—both in terms of projected advertising revenues and in terms of cable's ability to generate the audiences and programming needed to rival network television as the preeminent national advertising medium.

For classification purposes, cable television can be divided into three forms:

☐ advertiser-supported cable networks,
☐ pay-cable networks,
☐ local cable services.

Advertiser-Supported Cable Networks

Today there are eighteen established advertiser-supported cable networks. In addition, there are three superstations which function much the same as advertiser-supported cable networks: WTBS, Atlanta; WGN-TV, Chicago; and WOR-TV, New York.

Let's examine the revenue prospects for these networks and superstations through 1990. It is estimated that their collective national advertising revenues in 1981 approached $75 million. What is a realistic projection of cable advertising revenues in 1990? Here are three possible scenarios:

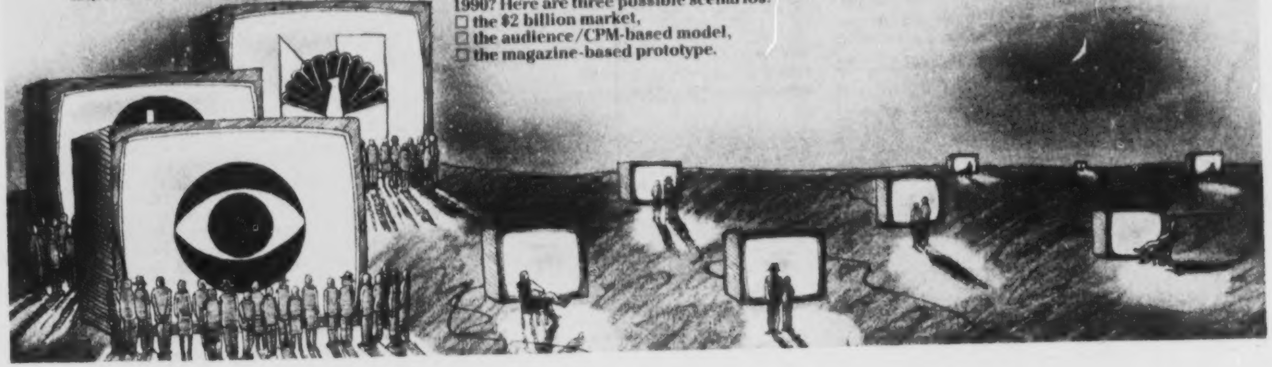
☐ the $2 billion market,
☐ the audience/CPM-based model,
☐ the magazine-based prototype.

EXHIBIT 1

Advertiser-Supported Cable Networks*

ABC Daytime
Black Entertainment Network (BET)
Cable Health Network
Cable News Network (CNN I & II)
CBS Cable
Christian Broadcasting Network
Cinemerica Satellite Network
The Disco Network
ESPN
Group W/ABC Satellite NewsChannel
Hearst/ABC ARTS
Las Vegas Entertainment Network
Modern Satellite Network (MSN)
Music Channel (MTV)
National Spanish Network
Satellite Program Network (SPN)
Spanish International Network (SIN)
USA Network

*As of February 1982



The first scenario focuses on the popular cable industry estimate of $2 billion in national advertising revenues by 1990. It is unlikely that all of the current networks will still be around by 1990. Assuming that ten of those networks survive, $2 billion would divide into $200 million in advertising revenues for each cable network.

The second scenario is built upon an audience/CPM equation. The consensus of opinion concerning cable penetration by 1990 has basic cable at a 60% level.

EXHIBIT II

1990 Projections/Cable Households

	Pay-Cable HH	Basic Cable Only HH	Non-Cable HH
Number	45,000,000	15,000,000	40,000,000
Percent	45%	15%	40%

Most predictions also agree on projected share of viewing, with advertiser-supported networks garnering a 14% share of viewing in pay-cable homes and a 20% share of viewing in basic cable-only homes, for an overall 9% share of viewing (see Exhibit III).

By 1990, TV homes are expected to equal 100 million. Based upon an annual 50 HUT level 6PM-1AM (46 today), this 9% share would translate to 4,500,000 households. An average of 1.5 viewers per household yields a total of 6.75 million adult viewers, or 675,000 viewers for each of the ten cable networks (see Exhibit IV).

To complete the revenue projection, some CPM estimate is required. Projecting the 1981 average network primetime CPM of $4.46 through 1990 at a 10% inflation rate, and adding a generous 33⅓% premium for the selectivity of the cable network audiences, yields a $12.75 CPM estimate for 1990. An average audience of 675,000 adults for each network times a $12.75 CPM equals an $8,500 30-second unit cost. Assuming a 4-minute per hour commercial load, this translates to $173 million in revenue for each of the ten networks.

EXHIBIT III

1990 Share of Viewing/Primetime & Fringe

	Networks	Independents /PBS	Pay-Cable Options	Basic Cable Originated Options
Pay-Cable Households (45%)	60%	6%	20%	14%
Basic Cable-Only Households (15%)	70%	10%	–	20%
Non-Cable Households (40%)	80%	20%	–	–
Total Households	70%*	12%*	9%*	9%*

*Note: These statistics are based on the cable television industry's own projections, in order to provide conservative, objective interpretation. However, CBS/Broadcast Group Research projects three-network shares of primetime and fringe program viewing will be 73 percent of total households in 1990.

EXHIBIT IV

1990 Basic Cable Services/ Average Audience Level

Share of Viewing	9%
6PM-1AM HUT	50%
Homes	4,500,000
Adult Viewers Per Home	1.5
Adult Viewers	6,750,000
Per Service (10 Systems)	675,000

EXHIBIT V

Basic Cable Services/ Estimated Average CPM

Primetime Network CPM Adults Today = $4.46

Projected to 1990—10% Compound Growth Rate = $9.56

Basic Cable Originated CPM Estimated at Approximately 1⅓ the Network TV CPM = $12.75

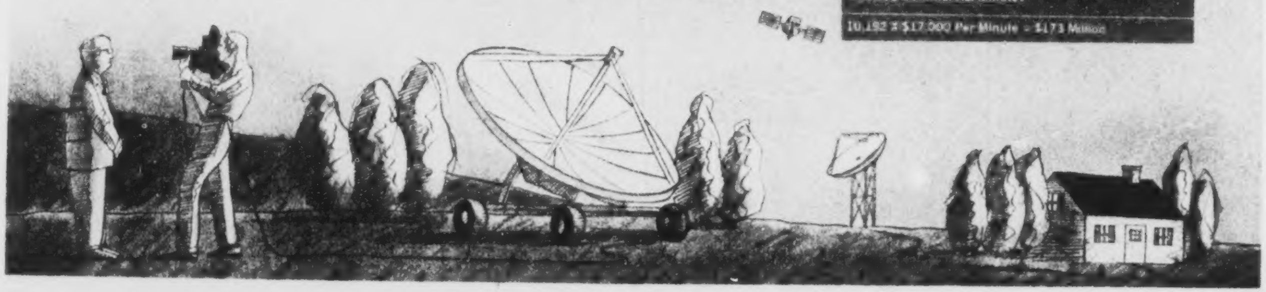
EXHIBIT VI

Basic Cable Services/ 1990 Advertising Revenue Projection

$$\frac{\text{Adult CPM}}{\$12.75} = \frac{\text{Average Per Service Adult Audience}}{675{,}000} = \frac{\text{Cost Per } 30''}{\$8{,}500}$$

4 Minutes Per Hour X 7 Hours X 7 Days X 52 Weeks = 10,192 Commercial Minutes

10,192 X $17,000 Per Minute = $173 Million



The third scenario models the 1990 advertising-supported cable network universe on the current magazine universe.

The first assumption of this model is that there will be eight types of cable networks paralleling the eight basic top circulation magazine formats of today. The eight types are newsweekly, cultural, adult entertainment, sports, women's service, fashion/style, shelter and business. An additional newsweekly would bring the total network count to nine.

The "magazine" revenue equation is based upon a combination of subscription revenues and advertising revenues. Focusing on the newsweekly service, we first estimate a total household circulation based upon the current 5% average circulation penetration figure of *Time* and *Newsweek*. Of 100 million TV households in 1990, 70 million will be able to receive cable service. If 5% of those households subscribe to cable "newsweeklies," the total household circulation will be 3.5 million. Today the *Time* and *Newsweek* price is $1.25 per issue, or $5 per month (actual subscription prices are lower). Increasing this figure by a 10% inflation rate yields a $10 per month 1990 rate. Assuming the cable TV "newsweekly" would be able to charge a monthly subscription fee of $10, the cable network would keep $5 out of this $10. Multiplying $5 by 3.5 million homes by 12 months equals a $210 million subscription revenue figure.

Exhibit VII

"Magazine" Service Sample Subscription/Advertising Revenue Equation — 1990

Newsweekly Model	
Household Circulation	3.5 Million
Monthly Subscription Fee	$10
Sub. Revenue to System	$210 Million
Adult Viewers	7 Million
CPM	$6
"Page" Rate*	$42,000
Pages Per Week	48 (12 30's X 12 Hrs X 7 Days 1008 30's ÷ 21 = 48)
Ad Revenues Per Week	$2 Million
Annual Ad Revenues	$104 Million
Total Revenue	$314 Million

*"Page" equals three exposures per day for one week

On the advertising side, 3.5 million households times a high-end estimate of 2 adult viewers per household (1.4 in primetime today) adds up to an average adult audience of 7 million. The 4-color bleed full page CPM for *Time* and *Newsweek* today is about $3. Inflating this figure by 10% per year brings the 1990 CPM to about $6. Multiplying the $6 CPM by the 7 million adult delivery yields a $42,000 "page" rate.

Now comes the difficult part. How does one translate a magazine page into television terms? Not all of the 7 million adults in subscribing households will view each commercial. For the model, one can assume that three spots per day over seven days would translate to a total adult audience equal to 100 GRPs or 7 million. (We have been overly generous considering that, at today's average cable network rating level, these spots would only generate 21 GRPs.) The cable network could accommodate 48 of these "page" advertisers, producing $2 million per week in advertising revenues, or $104 million for the full year. Adding the $210 million in subscription revenues to the $104 million in advertising revenues yields a total of $314 million.

A similar equation has been developed for each cable network type based upon its magazine counterpart. As Exhibit VIII shows, the total for all nine networks combined comes to slightly over $3 billion, or 1.5 times the estimates for the 100% advertiser-supported scenarios; even so, advertising revenues in this scenario are only $1 billion.

EXHIBIT VIII

Magazine Scenario Advertiser-Supported Services/1990 Revenues ($ In Millions)

		Circ. Revenues	Adv. Revenues	Total Revenues
Newsweeklies	(2)	$420.0	$208.0	$628.0
Cultural	(1)	108.0	88.4	196.4
Adult Entertainment	(1)	480.0	161.2	641.2
Sports	(1)	90.0	50.0	140.0
Women's Service	(1)	168.0	187.0	355.0
Fashion/Style	(1)	180.0	62.0	242.0
Shelter	(1)	480.0	197.5	677.5
Business	(1)	120.0	56.0	176.0
Grand Total		$2,046.0	$1,010.1	$3,056.1

It would appear that the third scenario represents the most potential for the cable industry. However, with the viewer base substantially reduced by the subscription fee, this scenario also represents the least threat to network television advertising revenues.

Now for a look at the network television side of the 1990 competitive picture. Estimates of 1990 network television advertising revenues range from $15-$20 billion. Using the lower figure, this represents a reasonable 12.1% annual compound growth rate. Added to this are the projected revenues for television stations. Robert Coen, the respected forecaster from McCann-Erickson, predicts total television station advertising revenues of $18 billion by 1990. To put these estimates into perspective, the ten cable networks would earn $200 million each and compete with the three networks earning $5 billion each, plus a substantial affiliate station revenue base.

EXHIBIT X

1990 TV Station Revenues

National Spot	$9.8 Billion
Local Spot	$8.2 Billion
Total	$18.0 Billion

EXHIBIT IX

Scenario Summaries

	Revenue Per Service				
	Circ. (000)	Adv. (000)	Total (000)	Number of Services	Total Revenue (000)
Scenario #1—$2 Billion Market	—	$200,000	$200,000	10	$2,000,000
Scenario #2—Audience/CPM Proj.	—	$173,000	$173,000	10	$1,730,000
Scenario #3—Magazine-Based	$227,000	$112,000	$339,000	9	$3,056,000

It would seem that each cable system could mount an effective schedule for $200 million. However, remember that these are 1990 dollars—$200 million then compares to about $80 million today. Eighty million dollars would not have paid the three networks' 1980 Presidential campaign costs or their combined NFL Football contract cost. In contrast, each network's $5 billion would equal $2 billion today. This is approximately equal to actual 1981 revenues. And, of course, added to this are the substantial station revenues fueling an aggressive local programming schedule. Given these comparative figures, it is projected that the networks will be able to outbid their advertiser-supported cable competitors for any programming that shows substantial audience appeal.

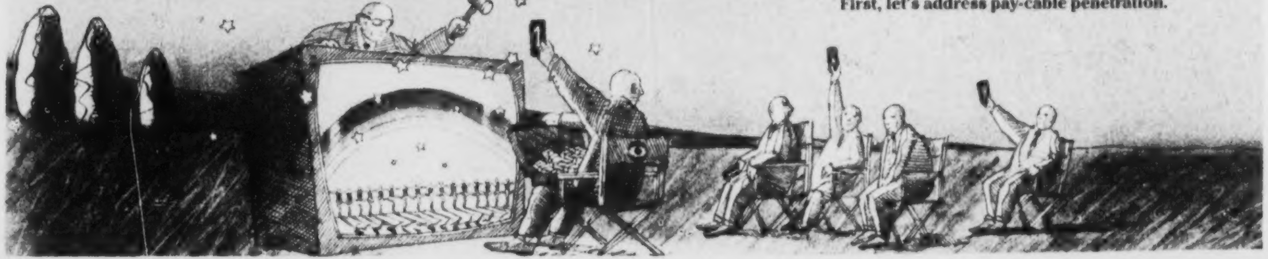
However, there is another component of the cable universe—pay-cable.

Pay-Cable Services

Most forecasters see pay-cable as a more significant threat to the networks than advertiser-supported cable. Already ad hoc theatre and cable hookups have taken the big fights from the networks. HBO, Showtime and WHT (The Movie Channel) offer viewers top, current-release films, some with "R" ratings, that will never be seen, uncut, on the three networks. The overall impact of pay-cable on free network television depends on four factors:

☐ the penetration of pay-cable,
☐ the maximum amount of viewing to pay-cable programming,
☐ whether or not pay-cable becomes an advertising medium,
☐ the number of pay-cable systems.

First, let's address pay-cable penetration.



By 1990, an estimated 60% of all U.S. households will subscribe to cable television. Of these, it is estimated that 75% will be subscribers to some pay-cable service. In other words, 75% of 60%, or 45% of all households, will subscribe to some pay-cable service (see Exhibit XI).

EXHIBIT XI

Pay-Cable Penetration

Pay Networks		
Home Box Office		Estimated Current Penetration: 14.6% of U.S. TV Households**
Showtime	=	
The Movie Channel		Estimated 1990 Penetration: 45% of U.S. TV Households
Cinemax		
Others*		

*Including Bravo, Escapade, GalaVision (Spanish), Spotlight, The Entertainment Channel.

** Source: CableVision, Feb. 1, 1982

Today HBO charges a monthly subscription fee of $8. Projecting to 1990, using a 12% inflation rate, the subscription rate would equal $20. The pay-cable service gets to keep half of this amount, or $10. Multiplying this figure by 45 million households yields $450 million per month in revenues, totalling $5.4 billion annually (see Exhibit XII and Note). That is an impressive figure. It is hard to say how many pay-cable systems will be sharing these dollars; but, nevertheless, collectively they should offer the networks significant programming competition in 1990. Multiple subscriptions could add to this total; however, competition from the hybrid pay/advertiser-supported services reflected in the magazine scenario could also siphon off some of this revenue base. While this large revenue pool should allow pay-cable services to develop original programming of their own, it is likely that theatrical features and sports events will remain their major viewer attraction through the 1980's.

EXHIBIT XII

Pay-Cable Revenues — 1990

Monthly Subscription Fee = $20

System's Share = $10

Subscriber Homes = 45,000,000

Monthly System Revenues = $450,000,000

Annual System Revenues = $5,400,000,000*

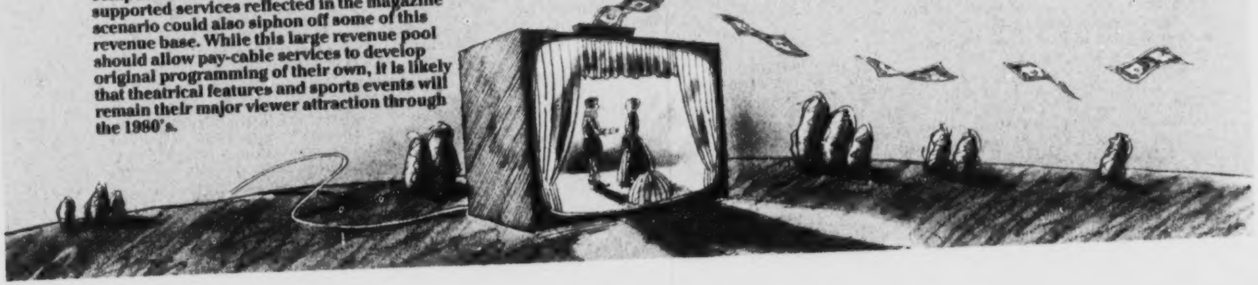
*Note: Recent experience with systems where multiple pay services are available has shown a substantial number of subscribers selecting more than one pay service. Multiple pay-service selection could add substantially to this revenue figure.

Continued access to major theatrical features may pose a problem for pay-cable services. Today the major production companies provide the pay-cable systems with their product reluctantly, as witnessed by the Getty Oil-financed Premiere venture that was killed by the Justice Department. The studios want a bigger piece of the action than the existing pay-cable systems provide. Industry observers expect to see similar ventures launched in the near future along the lines of the co-purchase of the USA Network by Time, Paramount and MCA. This will have the effect of fragmenting the pay-cable medium and preventing any one pay-cable service from reaching a revenue level substantial enough to challenge the networks on a regular basis. So pay-cable systems probably will compete for the same product in the future, and for the same subscribers.

Another component of the new video era is the videodisc market. Videodiscs represent an alternative form of direct access to the public for the major studios. To the extent that a pay-cable run limits the potential videodisc sales of a major film, studios will demand higher fees from the pay-cable programmers.

Finally, there is the question of the network market for theatrical films. Already the three networks are turning away from high-priced theatricals in favor of their own motion-pictures-for-television. The high cost of theatricals, coupled with their diminished audience drawing capacity due to prior pay-cable exposure, is making these films less and less attractive to the networks. For the 1980-81 season, 111 motion-pictures-for-television averaged a 17.3 rating. This was identical to the rating of the 78 theatrical features broadcast during this season. To the extent that the major studios find that pay-cable exposure weakens or precludes the possibility of a network television contract, these studios will demand more dollars from the pay-cable services.

Switching to the sports event section of the future pay-cable menu, one already sees ABC joining with ESPN to bid for cable coverage of major fights and other key sports events. Perhaps the single most lucrative property pay-cable could capture from the networks would be the NFL contract. A look at the comparative pay-cable and network financial summaries for the NFL franchise in 1990 follows.



On the pay-cable side, there is a potential subscriber universe of 70 million homes (all homes passed by cable). Assuming 40% of these homes will subscribe to the NFL service at $20 per month or $60 for the season, this is equivalent to the regular weekly NFL audience today. That would translate to $60 times 28 million households, or $1.68 billion dollars, approximately $840 million of which would go to the sponsoring pay-cable service. On the network side, a straight compounding of the current $280 million three-network revenue base by the 12.1% projected network television growth rate would result in a $877 million 1990 revenue estimate. So pay-cable seems to represent more revenue potential despite a low 28% expected penetration level vs. network TV's 100% level.

EXHIBIT XIII

NFL Football
Comparative Revenue Projections

Pay-Cable	
Cable Homes	70 Million
Buying NFL	40%
NFL Homes	28 Million
NFL Sub. Fee	$60
Revenues	$1.68 Billion
To Pay Service	$840 Million
U.S. Penetration	28%
Network TV	
1980 NFL Ad $	$280 Million
1980-1990 Growth Rate	12.1%
Proj. 1990 Ad $	$877 Million
U.S. Penetration	100%

However, it is not quite that simple. First, the actual pay-cable potential would be reduced by "pooled" viewing. Already a great deal of NFL viewing is social in nature, especially during the championship. It stands to reason that more men will view together at clubs, taverns, etc., if an economic incentive is added to the already existing social incentive. It is not known how much this pooled viewing would cut into pay-cable revenues, but it would be by a substantial amount.

Other factors may serve to limit the potential of an NFL contract for pay-cable.

Thirty percent of the current NFL audience will be disenfranchised due to lack of access to cable television. Whether the NFL or other interest groups would accept such an exclusion seems problematic at best. Regardless, a disenfranchised audience would represent a potential base for either enhanced coverage of college football by the networks or the introduction of a second professional football league. Either of these alternatives would be likely to draw a significant number of viewers from the pay NFL. The NFL will look hard at these potential downside risks before yielding to the allure of pay-cable revenues.

So, what is a reasonable estimate of the effect of pay-cable penetration on network audiences? A good projection gives pay-cable a 20% share of all viewing in its subscriber homes. Currently, pay-cable services average a 17% share of audience. This audience share has remained stable over the past two years. With increased competition from advertising-supported basic cable services, it seems unlikely that pay-cable's share will exceed 20% in 1990. A 20% share of viewing in 45% of all 1990 households represents a 9% share of all viewing. The low-end estimate of a 70% share of viewing for networks takes this 9% pay-cable projection into account (see Exhibit III).

The second area where pay-cable has the potential of hurting the networks is *direct competition for advertising revenues*. Today Madison Avenue is very much in support of advertising on pay-cable systems. First, the pay-cable systems are the only cable programmers that can deliver network level numbers today, albeit in a low percentage of total households. Second, the pay-cable subscriber household is demographically attractive.

If the advertising community prevails and pay-cable systems succumb to the attraction of advertising revenue, they will probably follow the "magazine" scenario, using advertising revenues to subsidize subscribers by offsetting inflationary subscription fees.

The pay-cable systems will resist interrupting programming for commercials. Instead, they will probably adopt a format similar to Screenvision, the theatre advertising service. Commercials would run in three-minute to five-minute clusters at the front of each program.

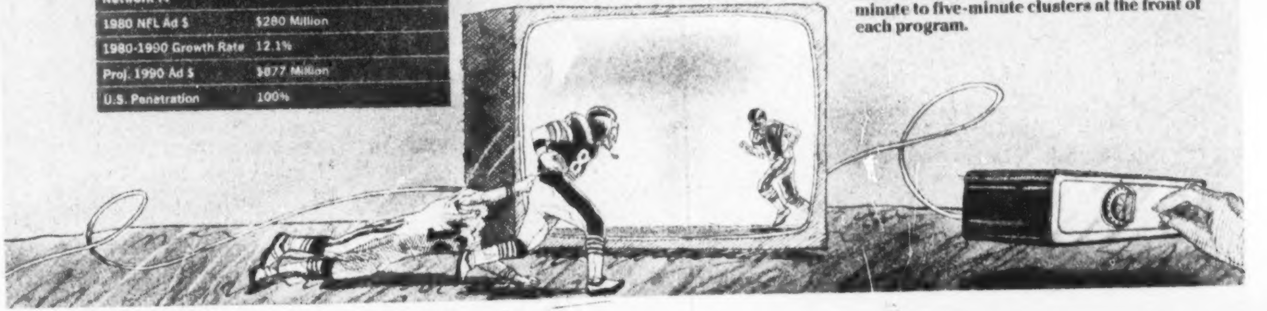


EXHIBIT XIV

Pay-Cable Advertising Revenues — 1990

Penetration = 45,000,000 Homes
20% Share = 12 rating
12 Rating = 5,400,000 Homes
CPM = $12.75*
Unit-Cost = $69,000 ($27,500 in 1980 $)
10 Units Per Movie = $690,000
2 Movies Per Night = $1,380,000
1 Late Movie = $345,000
Total Daily = $1,725,000
Annual $ = $620,000,000

*Although this CPM was originally established as an "adult" CPM, the assumption is that the premium pay service would be able to attract a comparable CPM on a "homes" basis.

Pay-cable's 20% share would translate to a 12 rating. Assuming a homes base of 45 million, this would be equivalent to 5.4 million homes. At a $12.75 CPM, the cost of a 30-second spot would be $69,000 (approximately $27,500 in current dollars). Five minutes of commercials per film would generate $690,000 in advertising revenues per film. Two films per night would double this figure. A third late night film at approximately one-half of this price would bring the total to $1.7 million per night in advertising revenues, or approximately $620 million per year. That's another impressive number, but not a severe threat to the networks' $15 billion revenue base.

Many of these advertisers are also likely to be non-TV advertisers, thereby providing a relatively low-cost entry into the medium, a step that will possibly lead to future network television expenditures.

Local Cable Advertising

The final element of the cable universe is the local cable sector. While not a direct threat to the networks, local cable system advertising is of concern to television station owners.

Cable industry estimates are for $500 million to $1 billion in local system ad revenues by 1990—not a significant amount in light of the $18 billion forecast for television stations. Local cable systems will probably not be competing directly, to any significant degree, with over-the-air television stations for local and national spot revenues. In the first place, with 4,225 systems operating today and many more expected by 1990, the medium will be too fragmented to compete effectively with TV stations. In the second place, with a proliferation of pay services with higher revenue potential (at no programming cost), local systems are likely to keep local programming to a minimum. Finally, the coverage patterns of individual cable systems conform to local radio station and newspaper markets, and it is from these media that local cable system advertising revenues are likely to come.

Summary

☐ In 1990, the networks and their affiliates all will be competing with advertiser-supported and pay-cable services. Together these competitors will attract 18% of the evening television audience.

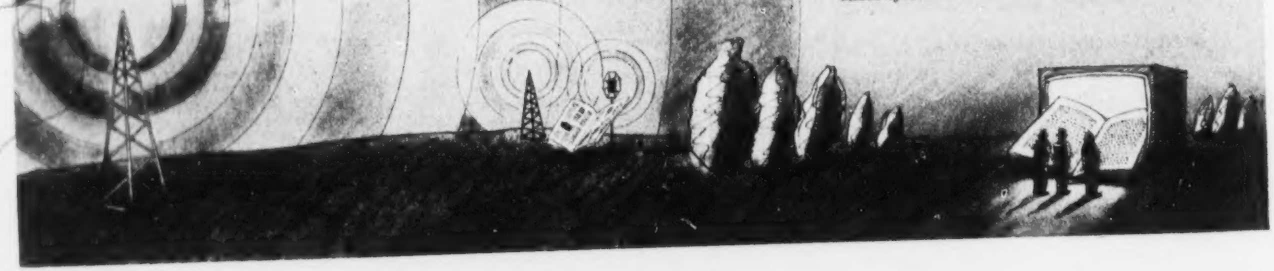
☐ The networks' share of the evening audience will decline to 70%; however, due to the growth of the TV household base, absolute audience delivery will actually be higher than in 1981.

☐ National advertising revenues for cable services will reach a maximum level of $3 billion, compared to the networks' $15-$20 billion total.

☐ Local cable advertising revenues will range between $500 million and $1 billion, while television station advertising revenues will reach $18 billion.

Teletext

Television broadcasters are not without their own new technological weapon. Teletext represents vast new advertising revenue potential, especially for the local television station. Teletext "pages" will challenge the newspaper industry for classified and price/item advertising. Today newspaper advertising revenues stand at $11 billion, a substantial target for new broadcast advertising billing. Teletext also will allow television to attract sales promotion dollars through video couponing and consumer information features. Consumer marketers today spend as much on sales promotion as they do on advertising. Teletext alone is expected to produce $1 billion in advertising revenues for television stations by 1990, a figure equal to the optimistic $1 billion forecast for local cable systems.



Offsetting Factors

If the television networks are destined to lose any revenue at all to the new cable competitors, they are, in all likelihood, going to replace that money with new dollars from new advertisers. In 1980, 91 new advertisers began advertising on network television. These advertisers spent a total of $81 million. If historical patterns hold true, 38 of them will still be around in 1985. And these advertisers will have increased their combined network television spending from $53.5 million in 1980 to $264 million in 1985. With cable television advertising only expected to equal $350 million by 1985, even if it all comes from network television, it will be more than replaced by the new advertisers entering the medium from 1980 to 1985. These new advertisers will be spending almost $1 billion collectively by 1985.

EXHIBIT XV

1985 Spending* of Advertisers Entering the Medium In:

1980	$264.0
1981	$211.0
1982	$168.0
1983	$131.0
1984	$103.0
1985	$ 81.0
Total	$956.0

*$ in Millions

On the local level, retail advertising is growing at a rate of 18.7%. Even at half this rate, the continued growth of retail advertising on television would produce $5 billion in local television station revenues by 1990.

Cable vs. Network in Perspective

Thus far, advertiser investments in cable have represented more of a hedge against the future than efficient television buys. Reasons given by advertisers for their cable television buys are:

☐ to test cable's effectiveness in reaching target audiences,
☐ to get charter rates and positions,
☐ to test new creative approaches,
☐ per-inquiry deals,
☐ merchandising potential of sponsorship.

While advertisers may find these good reasons for experimenting in cable, the CBS Television Network believes that sound cost/benefit analysis will continue to be the primary basis for advertising decisions.

Any such analysis would have to strongly consider cable's limited audiences.

WTBS, Ted Turner's Atlanta-based superstation, boasts the largest audience of any current cable option. With a household circulation of approximately 19 million and a maximum 5 rating level measured by NTI in this universe, WTBS offers the advertiser approximately 950,000 homes for an average unit cost of $3,000. This translates to a 1.2 national rating and a $3.16 CPM.

EXHIBIT XVI

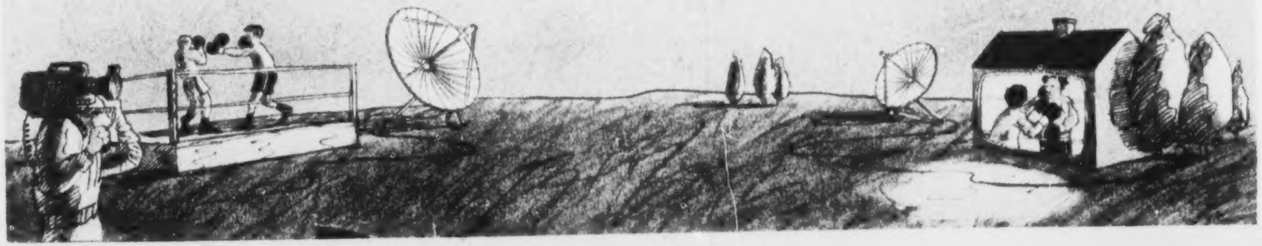
WTBS

HH Circulation: 19 Million (18,750,000)
5 Rating: 950,000
30" Unit Cost: $3,000*
CPM: $3.16
National Rating Level: 1.2
Potential U.S. Coverage: 23%
Est. National Adv. $: $30 Million

*Unit cost estimates are presented for illustration only and should not be construed as firm prices. Specific cable services should be contacted directly to determine unit costs prevailing at a particular time.

WTBS covers 23% of the U.S. and is expected to generate $30 million in national advertising revenues this year. The advertiser choosing WTBS must contend with the following shortcomings:

☐ *Unbalanced Coverage:* The WTBS audience is concentrated in Southeastern C & D counties. Only 2% of WTBS households are in the top 10 markets.
☐ *Cherrypicking:* Many systems that carry WTBS often preempt this superstation for programming, usually sports programming, of local interest.



☐ *Commercial Environment:* WTBS carries a great deal of local Atlanta advertising. To prevent advertisers from buying locally for the Atlanta-only coverage and obtaining full coverage, WTBS often overrides local spots with PSAs on its satellite feed. So the non-Atlanta viewer sees limited national advertising in a sea of PSAs. Add to this the fact that some of WTBS's films are broadcast in black-and-white, and the outcome is a less than ideal commercial environment.

☐ *The Audience:* The WTBS audience profile follows the standard independent station format of a mix of high kids comp and 50+ comp vehicles. The WTBS audience certainly shows no sign of possessing the selective characteristics consistent with the "narrowcasting" concept.

ESPN is another major advertising-supported cable service. This sports programming network is available to approximately 13 million households today. ESPN has averaged a 1 to 2 rating in the research studies released to date. A 2 rating yields an average audience of 260,000 households. At a reported 30-second unit cost of $750, this translates to a $2.88 CPM. Like WTBS, ESPN is estimated to generate $30 million in revenues. Potential U.S. coverage today is 17%.

EXHIBIT XVII

ESPN

HH Circulation: 13 Million (12,708,000)

2 Rating: 260,000

30" Unit Cost: $750*

CPM: $2.88

Potential U.S. Coverage: 17%

Est. National Adv. $: $30 Million

*Unit cost estimates are presented for illustration only and should not be construed as firm prices. Specific cable services should be contacted directly to determine unit costs prevailing at a particular time.

ESPN also suffers from local system "cherrypicking." Moreover, this service is likely to lose its most attractive elements to competing pay services in the future.

CNN is a third major national advertiser-supported cable service. CNN's original all-news service (CNN I) is available to just under 10 million homes. Like ESPN, this service also has posted a 1 to 2 rating in research studies released to date. That translates to 200,000 households. At a reported price of $500, this generates a $2.50 CPM. Potential U.S. coverage is 12%.

EXHIBIT XVIII

CNN I

HH Circulation: 10 Million (9,600,000)

2 Rating: 200,000

30" Unit Cost: $500*

CPM: $2.50

Potential U.S. Coverage: 12%

Est. National Adv. $: $15 Million

*Unit cost estimates are presented for illustration only and should not be construed as firm prices. Specific cable services should be contacted directly to determine unit costs prevailing at a particular time.

CNN I has its share of drawbacks. First, there is no "local" news element. Second, ABC, in conjunction with Westinghouse, has announced the introduction of a similar service, Satellite NewsChannel, fragmenting an already small audience. CNN's own response to the ABC/Westinghouse competition, CNN II, will only further fragment the audience. Finally, CNN accepts "per-inquiry" advertising. Most of this is voice-over slide pitches—not the ideal partner for the national advertiser's $100,000+ commercial.

Perhaps the best way to put the cable competitors in proper perspective is to compare them to *The CBS Morning News*. *Morning* offers the national advertiser 98% coverage, or a potential of 80 million homes. During one-quarter of the year, 30% of the TV homes in the U.S. will actually watch *Morning* at least once. The average annual household rating for *Morning* is a 2.5, equal to 2,000,000 homes. At a 30-second unit cost of $3,500, this generates a competitive $1.75 CPM.

EXHIBIT XIX

The CBS Morning News

HH Circulation: 80 Million

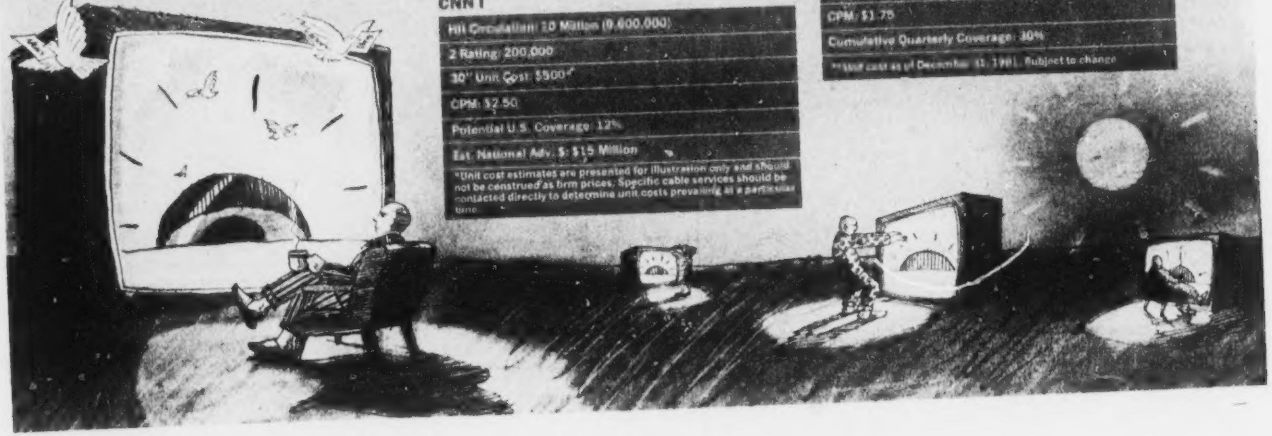
2.5 Rating: 2,000,000

30" Unit Cost: $3,500**

CPM: $1.75

Cumulative Quarterly Coverage: 30%

**Unit cost as of December 31, 1981. Subject to change



The choice seems clear: *The CBS Morning News*—with 30% U.S. coverage quarterly, 2 million homes delivered per 30, and a $1.75 CPM—or one of the more limited cable competitors. Don't forget *Morning*'s even national distribution, prestige value, proof of performance and merchandisability.

EXHIBIT XX

The CBS Morning News vs. Cable Services

	CBS Morning News	WTBS	CNN I	ESPN
Coverage	30%	23%	12%	17%
Avg. HH Audience	2,000,000	930,000	200,000	250,000
CPM	$1.75	$3.16	$2.50	$2.88
	+			
	Even National Distribution			
	Prestige Vehicle			
	Proof of Performance			
	Merchandisability			

In fact, the expanded *Morning* program and its weekend counterpart, *Sunday Morning*, will generate national advertising revenues comparable to any one of these cable services in 1982.

For the foreseeable future at least, network television will continue to be the predominant national advertising medium. However, as cable penetration spreads, cable systems will become increasingly viable competitors.

The emergence of cable is no cause for alarm, as long as advertising on cable is commensurate with the audience values cable delivers. A potential problem does exist, however, if agencies and advertisers abandon sound media planning and buying procedures in a speculative rush to position themselves in the vanguard of cable communicators.

Such a course is bad for everyone. It is bad for the advertisers, whose products may not be getting maximum exposure. It is bad for the advertising agencies that can no longer document the performance of their advertising buys. It is bad for the new cable industry, if ill-conceived initial investments in the medium lead to disillusionment on the part of some advertisers. And, of course, it is bad for the television networks and the television stations.

The CBS Television Network currently is sponsoring research designed to measure the advertising values delivered by these new cable contributors. Look for our regular reports on cable audiences.

The dinosaur's extinction is attributed in large measure to its low intelligence and its inability to adapt to a changing environment. Over the years, network television has proved eminently adaptable—absorbing new technologies as they emerge and recasting its programming in response to evolving tastes and a changing world.

Big, dumb and unresponsive—that's a problem. But big, smart and adaptable, that's another story.

By the end of the decade, the television landscape will look significantly different. But the CBS Television Network believes that the predominant share of television audiences, and the bulk of advertising revenues, will continue to be where they are today—in commercial broadcasting.